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Sentencing Guidelines in Minnesota, 1978–2003

ABSTRACT

Minnesota's guidelines, related sentencing laws, and charging and sentencing practices have evolved considerably since 1980. Sentencing has been coordinated with available correctional resources, avoiding prison overcrowding and ensuring that space is available to hold the most serious offenders; "truth in sentencing" has been achieved; custodial sanctions have been used sparingly; and the guidelines remain simple to understand and apply. However, the sentencing commission's emphasis on just deserts was undercut by subsequent appellate case law, legislation, and sentencing practices. Minnesota has achieved a workable and sustainable balance between sentencing purposes and in other important areas.

Minnesota was the first jurisdiction to implement legally binding sentencing guidelines developed by an independent sentencing commission. Minnesota's guidelines have served as a model for other state guidelines reforms, and for revised American Bar Association and Model Penal Code sentencing standards (American Bar Association 1994, pp. xxi–xxv; Reitz 2003, pp. 50–63). The guidelines have been in effect since 1980 and have evolved considerably while still retaining their original essence. Sentencing practices have been carefully monitored by the guidelines commission and by outside researchers, using the commission's extensive sentencing databases. This rich source of data and commentary, combined with appellate case law and over two decades of legislative and commission-initiated amendments, contains

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essential lessons not only about drafting and implementing presumptive sentences but also about the evolution of such a system over time. This essay tells the story.

The most important themes may be summarized as follows. First, the nature and priority of the reform goals and sentencing principles underlying the guidelines have evolved considerably since 1980, and their number has grown: there are now at least eight, compared with only three or four at the outset. When it enacted the enabling statute in 1978, the legislature's primary aim was to reduce disparity in the treatment of similarly situated offenders by reducing judicial and correctional discretion. The commission recognized the twin goals of uniformity in the use of state prison sentences, with particular emphasis on preventing racial, gender, and socioeconomic disparities; and proportionality of prison commitment and duration decisions, relative to offense severity and offender criminal history. The commission gave much greater emphasis to just deserts principles than the legislature had.

Two other initial legislative goals were to improve the rationality of sentencing decisions and sentencing policy formulation and to coordinate sentencing policy with available correctional resources, especially prison and jail capacities. The latter goal was embodied in a directive to the commission, which it took very seriously, giving particular emphasis to the importance of avoiding prison overcrowding and reserving limited prison bed space for violent offenders. Rationality goals were implicit in the creation and design of the commission itself as an independent agency charged with collecting information, drafting guidelines, and monitoring their implementation. Sentencing policy was to be informed by data, comprehensive across crimes and judicial districts, and at least partially insulated from short-term political pressures. Rational sentencing and reduced disparity were to be fostered by authorizing defense and prosecution sentence appeals. Such appeals, and the legal precedents they generate, serve to enforce guidelines rules, clarify ambiguities, and gradually develop sentencing policy through a common-law process.

In later years, the legislature expressly recognized two other goals: "truth in sentencing" (prison sentences served should be at least as long as the term announced at the time of sentencing) and public safety, which was designated as the commission's "primary" consideration. However, both goals had been recognized to some extent from the start. The substitution of limited "good time" credits for broad parole release

discretion served to increase truth in sentencing. As for public safety, the 1978 legislature had signaled in a variety of ways that crime control should continue to be an important purpose of, and at, sentencing.

On its own, the commission adopted two further goals: sentencing "parsimony" and "guidelines simplicity." The principle of parsimony is embodied in guidelines provisions stating that custody sentences and probation conditions should be the least restrictive necessary to achieve the purposes of the sentence. The goal of simplicity is implicit in many of the commission's decisions—guidelines rules should be easy to understand and apply.

A second important theme of this essay is the hybrid nature of Minnesota's approach to sentencing theory. Although the guidelines are widely considered to be based on a just-deserts model, utilitarian sentencing purposes were given important roles right from the start. The commission's "modified just deserts" model was indeed very modified and became steadily more so over time. As the system evolved, it came to resemble very closely Norval Morris's (1974, 1982) "limiting retributivism" model—offense severity and offender culpability set upper and occasionally lower limits on sentencing severity, but in most cases these limits are rather broad, especially in practice. Within these outer desert limits, utilitarian sentencing goals may be applied, including offender rehabilitation and risk management.

A third theme is the importance of maintaining a workable balance in several key dimensions of sentencing policy—among sentencing purposes, between the competing goals of uniformity and flexibility, in the degree of severity imposed on different types of crime, and in the roles and powers of the various actors whose decisions shape sentencing policy and case outcomes. The guidelines have achieved a very good balance in each of these areas, which helps to explain how they gained the support they needed to succeed and survive over the long term.

A final theme is the limited nature of what Minnesota tried to achieve. The guidelines provide valuable guidance to judges and practitioners and help make sentencing more uniform, proportional, honest, and predictable. But judges and practitioners retain substantial discretion to tailor sentences to the particular facts of the offense or offender. Some important decisions related to sentencing are not regulated at all. The legislature did not give the commission authority to promulgate guidelines for misdemeanor sentences (as some states with guidelines have done; Frase 1999, p. 70), nor did it authorize the commission to regulate charging and plea bargaining practices (which can distort or

evade sentencing rules). The commission has never asked for authority in either sphere and has conducted only limited research on charging and plea bargaining.

The commission was authorized to develop guidelines regulating jail terms and other conditions of probation, and it arguably also had authority to promulgate guidelines for decisions to revoke probation or conditional release. In drafting the initial version of the guidelines, the commission chose not to regulate any of these decisions. Nor did it try to encourage broader use of intermediate sanctions, as several other state guidelines systems have done (Frase 1999). The commission has collected some data about probation conditions, but none on misdemeanor sentences, even though the latter often involve jail and other intermediate sanctions similar to those used in felony cases. Several times the commission has examined the possibility of guidelines for probation conditions but has chosen not to recommend them, because of strong resistance from practitioners and other reasons. The commission also declined to request a clear legislative mandate to regulate probation conditions or revocations.

The modest scope of the Minnesota guidelines is one reason that they are relatively simple to understand and apply. It may also help to explain why the guidelines remain well balanced as to competing sentencing goals and broadly accepted by judges and attorneys. However, the guidelines' modest scope and the commission's decisions not to use its authority to its fullest or seek to expand its authority have also meant that Minnesota lost the opportunity to tackle a number of important issues. In particular, the commission was unable effectively to promote the use of a wider range of community-based and other intermediate sanctions, state funding for such sanctions, and broader judicial and public acceptance of them. As a result, Minnesota continues to make very heavy use of jail sentences in felony cases, even though many of these offenders are probably suitable candidates for intermediate sanctions.

Here are the organization and major conclusions of this essay. Like many a modern screenplay, the story begins at the end. Section I briefly summarizes the basic structure, terminology, and application of the current guidelines (which, despite numerous amendments, remain similar in many respects to the original 1980 version). The summary provides an introduction (or refresher course) on how the guidelines work and a framework for understanding the history recounted in the rest of the essay. Section II examines the origins of this reform effort, the

key events leading to passage of the 1978 enabling statute, and the most important provisions of that statute and related sentencing laws. During these debates, and in the laws that emerged, there was strong support for the goal of reducing sentencing and parole release discretion but little support for making radical changes in sentencing purposes, outcomes, or costs. These seemingly contradictory legislative intents foreshadowed the hybrid approach to sentencing theory, which was adopted by the commission and elaborated by courts and practitioners.

Section III describes how the commission went about drafting and implementing the original version of the guidelines. The commission attempted to make significant changes in sentencing practices, in particular by sending more violent and fewer recidivist property offenders to state prison, and by giving increased emphasis to retributive principles. But the commission's modified just deserts approach still allowed nonretributive goals to play important roles (as they had before the guidelines). In another important policy decision, the commission went well beyond the legislature's directive to take account of available correctional resources and decided that prison populations should not exceed 95 percent of capacity. In pursuit of this goal, a sophisticated computerized forecasting model was developed and applied to each version of the proposed guidelines, both before and after the guidelines were implemented. Thus was born the concept and methodology of sentencing policy "resource-impact assessment"—an innovation that was later adopted in some form by most other state guidelines systems. The Minnesota commission's prison-impact modeling is made possible by its extensive database on past and current sentencing practices—an essential resource that also supports the commission's responsibilities to monitor and periodically revise the guidelines.

Section IV traces changes in the guidelines and related laws since 1980, including major appellate case law, new or amended sentencing statutes, and guidelines changes initiated by the commission or the legislature. Guidelines case law has strongly reinforced some aspects of the commission's work (e.g., the decision to base sentences on the conviction offense rather than the "real-offense"), but it has allowed greater scope for utilitarian sentencing goals than the commission did, thus moving the guidelines further toward Morris's model of limiting retributivism. Most of the statutory changes since 1980 have involved increases in authorized or required sanction severity, sometimes including directives to the commission to make specified guidelines provisions

more punitive. The legislature's primary emphasis has been on public safety (and, thus, utilitarian rather than retributive sentencing goals). Guidelines changes initiated by the commission since 1980 were generally designed to achieve one or more of the eight goals identified previously or to counteract practices deemed inconsistent with them.

Section V summarizes the voluminous data and evaluative literature on Minnesota sentencing practices, showing the guidelines' initial impact (1981–85 compared with 1978 baseline data) and the ways in which sentencing patterns have evolved over time. Sentencing disparities declined in the early years of the guidelines, although probably not by as much as would be suggested by the commission's conviction-offense-based "departure rates" (which do not take account of the substantial changes that occurred in the types of offenses prosecuted and in charging and plea bargaining practices). Downward (mitigating) departure rates rose rapidly in the early 1980s as courts began to make use of additional departure grounds recognized in appellate case law; these rates remained stable until the end of the decade but then rose again in response to the substantial increases in presumptive sentence durations enacted in 1989. High dispositional and durational departure rates have not, however, consistently favored whites over other racial groups.

Other significant changes in sentencing and correctional patterns from 1981 through 2002 included the following: the total number of felons sentenced per year more than doubled (drug crimes more than quadrupled), with the proportion of nonwhite offenders increasing from 18 to 40 percent. The proportion of felons sentenced to jail as a condition of probation rose from 46 to 66 percent, raising the proportion receiving a custodial sentence (prison or jail) to 90 percent—considerably higher than the national rate. Minnesota's prison rate, varying between 20 and 24 percent in most years, remained far lower than the national average, and the state's per capita prison and prison-plus-jail incarceration rates have been among the lowest in the nation. African American per capita prison rates continue to be far higher than white rates, but most of this racial disproportionality reflects differences in arrest rates.

Section VI reflects on the twenty-five year history of sentencing reform in Minnesota and considers the guidelines' successes, failures, and future prospects. Most of the eight goals listed above appear to have been achieved in significant respects. The guidelines have been modestly successful in achieving greater uniformity, proportionality, and

truth in sentencing, and in changing the mix of offenders sent to state prisons. However, some of the commission's attempts to change well-established sentencing practices were strongly resisted by practitioners, even in the early years. Sentencing policy formulation under the guidelines has become much more data driven, comprehensive, and consistent, but it has only been partially insulated from political pressures. Sentence appeals have generated a rich body of appellate case law, which enforces, clarifies, and develops guidelines' principles without unduly constraining trial courts' ability to do justice based on case-specific facts. The guidelines have succeeded in promoting the parsimonious use of prison sentences and in preventing prison overcrowding. And they also remain fairly simple to apply. The guidelines have probably had little impact on public safety, although the available data do not permit a detailed assessment.

This section also addresses some of the unintended consequences and common criticisms of guidelines sentencing in Minnesota and elsewhere, examines recurring challenges and unresolved policy issues, and describes several important sentencing initiatives currently under way. Because judges retain considerable discretion under Minnesota's guidelines, there have been few complaints of excessive prosecutorial control over sentencing. More serious criticisms can be made of the increasing proportion of drug offenders in the state's prisons, the frequent use of jail sentences rather than other community-based sanctions, and the lack of any standards to govern charging and plea bargaining concessions, conditions of stayed sentences, and decisions to revoke probation or conditional release. As this essay was being completed, state policy makers were considering major changes in the sentencing of drug crimes and sex offenders. The proposed changes in sex offense penalties were prompted by intense media attention to a single high-profile case generating a classic "moral panic" (Tonry 2004, pp. 85–96). This has happened several times before; the results in each case were major penalty escalations risking serious disproportionality, especially in relation to other serious crimes, and reducing sentencing uniformity (by increasing departure rates).

Section VII considers the circumstances that helped the Minnesota guidelines to succeed, and which may allow them to survive. Many of the factors that allowed guidelines to thrive in Minnesota may be difficult to reproduce in other jurisdictions—progressive political traditions, a few highly dedicated and talented reform leaders, less punitive times, and other unique circumstances. But the guidelines structure

itself also made a difference. And Minnesota has become more and more like the rest of the country; what worked in Minnesota can also work elsewhere, as is shown by the number of states that have adopted similar commission-based guidelines.

I. The Current Guidelines

The basic structural elements of Minnesota's guidelines are reflected in the current grid shown in table 1 (Minnesota Sentencing Guidelines Commission [MSGC] 2003*b*, sec. IV).¹ The defendant's criminal history score (horizontal axis) consists primarily of previous felony convictions, but additional points can be added for certain prior misdemeanor convictions or juvenile adjudications, and for being in "custody status" (e.g., on probation) at the time of the current offense.

The guidelines specify the sentence that is presumed to be correct for each combination of offense severity and criminal history. Judges may depart from the presumptive sentence only if they cite "substantial and compelling circumstances" (MSGC 2003*b*, sec. II.D). Offenders with low to medium criminal history scores who are convicted of lower severity offenses presumptively receive a stayed (suspended) prison term of a specified number of months; for more serious offenses or criminal history scores, the presumptive sentence is an executed prison term within a specified range.

The boundary between presumptive stayed and presumptive executed prison terms is shown on the grid by a heavy black line (the "disposition line"). Although most cases below the line have presumptive stayed sentences, some are subject to statutory mandatory minimum prison terms (most of these cases involve recidivists or the use of a dangerous weapon). However, many of these prison terms are not truly "mandatory"—statutes and case law permit departure if the general or an offense-specific departure standard is met.

Except for first-degree murder (which is excluded from the guidelines and is subject to a mandatory sentence of life or life without parole),

¹ As described in Sec. IV of this essay, numerous changes have been made to the grid and its components since the original 1980 version. Presumptive durations have been raised or lowered in many cells; e.g., the presumptive sentences at the top four severity levels on the 1980 grid, for an offender with zero criminal history, were 24, 43, 97, and 116 months. Prior to the adoption of weighting in 1989, all felony convictions contributed one point each to the criminal history score. In 1996 the vertical axis was reversed, placing the highest severity level at the top instead of the bottom of the grid. In 2002 a new severity level, VII, was created for felony DWI cases; former levels VII–X then became levels VIII–XI. In the remainder of this essay, references to former severity levels VII–X are indicated with an asterisk preceding the number (e.g., level *VIII).

discretionary parole release was abolished by the guidelines-enabling statute. Defendants with executed prison terms serve their entire term, less a credit of up to one-third for good conduct in prison. Offenders released from prison serve a parole-like "supervised release" term equal in length to the good-conduct reduction in their prison term (sex offenders and felony drunk drivers serve a longer "conditional release" term).

Additional rules specify permissible and impermissible bases for departure from the presumptive dispositions and prison durations. Case law limits most upward durational departures to twice the presumptive prison term, but in extreme cases such departures may go all the way up to the statutory maximum for the most serious conviction offense. With some exceptions, multiple offenses are presumptively to be sentenced concurrently, not consecutively.

The guidelines permit a wide variety of possible conditions of stayed prison sentences. Except for a few offenses with required jail terms,² judges have discretion to choose among these stay conditions: up to one year of confinement in a local jail or workhouse, treatment (residential or outpatient), home detention (with or without electronic monitoring), day reporting, probation (with "intensive," regular, or no supervision), fines and day fines, restitution, victim-offender mediation, and community service work. In felony cases, the duration of the stay (i.e., the length of probation) may be any period up to the maximum prison term that could have been imposed or four years, whichever is longer.

II. Origins

Prior to the mid-1970s, Minnesota—like all U.S. jurisdictions—employed an indeterminate sentencing system (Parent 1988, pp. 15–21). There were few mandatory minimum penalties, maximum penalties were often quite severe (e.g., twenty years for burglary; Minn. Stat., sec. 609.58, subd. 2 [1978]), judges had almost complete discretion to impose any sentence up to the statutory maximum, and parole boards had broad discretion to decide how much of any prison sentence had to be served. These discretionary powers were based on the view that the

² The following statutory provisions mandate a jail sentence, if an executed prison term is not imposed: Minn. Stat. secs. 152.024, subd. 3, and 152.025, subd. 3 (repeated controlled substance crime); sec. 169.276, subd. 2 (felony drunk driving); sec. 609.109, subd. 2 (repeated criminal sexual conduct); secs. 609.342, subd. 3, 609.343, subd. 3, 609.344, subd. 3, and 609.345, subd. 3 (intrafamilial child sex abuse); sec. 609.582, subd. 1a (burglary of an occupied dwelling); and sec. 609.583 (other burglary of a dwelling).

TABLE 1
Minnesota Sentencing Guidelines Grid Presumptive Sentence Lengths in Months, Effective August 1, 2002

Severity Level of Conviction Offense (Common Offenses)	Criminal History Score						
	0	1	2	3	4	5	6 or More
XI. Murder, second degree (intentional murder; drive-by shootings)	306	326	346	366	386	406	426
X. Murder, third degree; Murder, second degree (unintentional murder)	299-313 150	319-33 165	339-53 180	359-73 195	379-93 210	399-113 225	419-33 240
IX. Criminal sexual conduct, first degree*	144-56 86	159-71 98	174-86 110	189-201 122	204-16 134	219-31 146	234-46 158
Assault, first degree	81-91	93-103	105-15	117-27	129-39	141-51	153-63
VIII. Aggravated robbery, first degree	48	58	68	78	88	98	108
VII. Felony DWI	44-52 36	54-62 42	64-72 48	74-82 54	84-92 60	94-102 66	104-12 72
VI. Criminal sexual conduct, second degree (a) and (b)	21	27	33	39	45	51	57
V. Residential burglary; Simple robbery	18	23	28	33	38	43	48
IV. Nonresidential burglary	12 [†]	15	18	21	24	27	30
					23-25	26-28	29-31

III. Theft crimes (over \$2,500)	12 [†]	13	15	17	19	21	23
II. Theft crimes (\$2,500 or less)	12 [†]	12 [†]	13	15	17	19	21
Check forgery (\$200-\$2,500)					18-20	20-22	22-24
I. Sale of simulated controlled substance	12 [†]	12 [†]	12 [†]	13	15	17	19
							18-20

SOURCE—MSGC 2003b, p. 48.

NOTE.—Italicized numbers within the grid denote the range within which a judge may sentence without the sentence being deemed a departure. Numbers not in bold denote presumptive commitment to state imprisonment. First-degree murder is excluded from the guidelines by law and continues to have a mandatory life sentence. See Minnesota Sentencing Guidelines, sec. II.E. "Mandatory Sentences," for policy regarding those sentences controlled by law, including minimum periods of supervision for sex offenders released from prison. Bold type denotes presumptive stayed sentence; at the discretion of the judge, up to a year in jail and/or other nonjail sanctions can be imposed as conditions of probation. However, certain offenses in this section of the grid always carry a presumptive commitment to state prison. These offenses include third-degree controlled substance crimes when the offender has a prior felony drug conviction, burglary of an occupied dwelling when the offender has a prior felony burglary conviction, second and subsequent criminal sexual conduct offenses, and offenses carrying a mandatory minimum prison term because of the use of a dangerous weapon (e.g., second-degree sexual Minnesota Sentencing Guidelines, secs. II.C, "Presumptive Sentence," and II.E, "Mandatory Sentences,").

*Pursuant to Minn. Stat., sec. 609.342, subd. 2, the presumptive sentence for criminal sexual conduct in the first degree is a minimum of 144 months (see Minnesota Sentencing Guidelines, secs. II.C "Presumptive Sentence," and II.G "Convictions for Attempts, Conspiracies, and Other Sentence Modifiers").

†One year and one day.

most important goal of punishment was to rehabilitate offenders and that this required sentences to be tailored to the particular treatment needs and release risks posed by each offender. Judges would initially decide whether the offender was amenable to treatment in the community; if he was not, a substantial prison term would be imposed, and parole officials would then monitor the defendant's progress and determine when it was safe to release him.

However, in the 1970s, indeterminate sentencing began to fall out of favor across the United States and in Minnesota (Blumstein et al. 1983, pp. 1-3; Parent 1988, p. 16). Some critics argued that the broad discretion exercised by judges and parole boards permitted substantial disparities in the sentencing of offenders convicted of similar crimes, that case-specific assessments of offender amenability and dangerousness were unreliable, and that few treatment programs had been shown to be effective. Other critics felt that judges and parole boards used their discretion to impose unduly lenient sentences, citing as examples a number of high-profile crimes committed by released offenders (Parent 1988, p. 21). Several books were published proposing renewed emphasis on retributive or "just deserts" principles, with little or no consideration of rehabilitation or dangerousness (see, e.g., von Hirsch 1976). Federal judge Marvin Frankel (1972, 1973), in a series of writings that had a major impact on sentencing guidelines reforms across the country, also supported more uniform and principled sentencing and proposed the creation of an expert, independent sentencing commission to study and recommend sentencing standards. In the late 1970s and early 1980s, Minnesota and many other states enacted or expanded mandatory-minimum sentence laws, and some states adopted statutory determinate sentencing laws sharply limiting judicial or parole discretion (Blumstein et al. 1983, pp. 132-35). Judges in a few jurisdictions began experimenting with sentencing institutes and councils or voluntary guidelines, and some parole boards developed guidelines to limit discretion in the releasing decisions (Blumstein et al. 1983, pp. 129-30, 138-40). Minnesota implemented parole release guidelines in 1976 (Parent 1988, p. 20). The Minnesota parole guidelines, like those in most other jurisdictions, took the form of a two-dimensional matrix, or grid, with offense seriousness on the vertical axis, offender risk scores on the horizontal axis, a recommended range of release dates in each cell of the grid, and a requirement that reasons be given for departing from that range.

As a result of these criticisms and trends, as well as a series of prison disturbances, Minnesota embarked on several years of legislative

debate on issues of sentencing reform (Clark 1979; Martin 1984; Parent 1988, pp. 21–27). The state's first determinate sentencing bill was introduced in 1975 by Senator William McCutcheon. It called for mandatory terms of five, ten, or fifteen years, without good time reductions or parole. Since it would have greatly increased prison populations, Senator McCutcheon intended his bill "not as a serious proposal but as a device to focus debate on sentencing reform" (Parent 1988, p. 22). After further study by a subcommittee chaired by McCutcheon, a more flexible proposal was introduced in 1976. The revised bill left judges with discretion as to the prison-versus-probation decision, allowed them to depart up or down by 15 percent, and retained good time credits (but not parole). McCutcheon, a member of the Democratic-Farmer-Labor (DFL) Party and also a St. Paul deputy police chief, sought to satisfy advocates of greater severity, liberals opposed to severity, and fiscal conservatives by continually modifying his bill so as to maintain a neutral impact on the size of state prison populations (Parent 1988, pp. 24–25). This bill passed but was vetoed, partly in response to concerns of Corrections Commissioner Ken Schoen and some legislators that legislative determinate sentencing would eventually produce escalating prison populations. The bill was reintroduced and passed by the Senate in 1977, but by then a competing proposal had surfaced in the House. Sponsored by DFL Representative Kempe, it called for guidelines governing both prison use and prison duration, to be established by a commission of judges (Parent 1988, pp. 26–27). Agreement between the Senate and the House was finally achieved in 1978; the guidelines-enabling statute, signed by the governor on April 5, was similar to the House bill but with a more broadly representative sentencing commission (1978 Minn. Laws, ch. 723; reprinted in MSGC 1980, pp. 47–56; codified, as amended, at Minn. Stat., sec. 244.09).

Under the terms of the enabling statute, the commission was to be composed of nine members: a justice of the Minnesota Supreme Court, two district judges, one public defender, one county attorney, the commissioner of corrections (or designee), the corrections (parole) board chairman (or designee), and two public members (1978 Minn. Laws, ch. 723, art. I, sec. 9, subd. 2). (The commission now has eleven members, including three public members, a police officer, a probation or parole officer [in lieu of the former corrections board representative], and a court of appeals judge [in lieu of one of the district court judges]; Minn. Stat., sec. 244.09, subd. 2.)

The commission was directed to promulgate guidelines for the sentencing of felony cases, regulating both the decision to impose state imprisonment and the duration of such imprisonment, based on "reasonable offense and offender characteristics." The commission was further instructed to take two factors into "substantial consideration": "current sentencing and releasing practices" and "correctional resources, including but not limited to the capacities of local and state correctional facilities" (1978 Minn. Laws, ch. 723, art. I, sec. 9, subd. 5). The commission was permitted (but not required) to develop guidelines regulating the conditions of nonprison sentences. Parole release discretion was abolished and replaced with a sentence reduction of up to one-third for good behavior and a period of postrelease supervision equal to the good conduct reduction. The statute also implied that denial of good time reductions could only be based on disciplinary violations, not failure to participate in or cooperate with in-prison treatment programs (since all such programs were to become voluntary; 1978 Minn. Laws, ch. 723, art. I, secs. 2-3). Finally, sentencing judges were directed to provide written reasons when they departed from the new guidelines, and both defendants and the prosecution were given the right to appeal any sentence (whether or not it was a departure).

It seems clear that a major purpose of the statute was to reduce sentencing discretion, thus promoting greater uniformity of sentences, but what punishment purposes did the legislature want such sentences to serve? The goal of uniformity does not necessarily imply an emphasis on just deserts, since considerable case-level discretion may also be needed in order to "make the punishment fit the crime." Subsequent commission reports tell us that retribution (or just deserts) is the "primary sentencing goal" under the guidelines (MSGC 1984, pp. v, 10-15), but this choice was not based on any clear expression of legislative intent. Subsequent legislation, appellate case law, and trial court departure practices all strongly indicate continued adherence to utilitarian sentencing goals, especially rehabilitation and incapacitation.

Although the guidelines-enabling statute suggests no particular rationale or choice between sentencing purposes (von Hirsch 1987, p. 65), the statute does direct the commission to give "substantial consideration" to existing sentencing and releasing practices. This language implies both limited change in preexisting norms and substantial continued emphasis on utilitarian goals. The predictions of dangerousness inherent in parole release were rejected, but not necessarily all such predictions. And although prison treatment

programs were made voluntary and not tied to release, treatment in the community—even mandated treatment—was not necessarily rejected (cf. Goodstein [1983, p. 494], noting the early emergence of the practice of setting mandatory treatment conditions of supervised [postprison] release).

The legislative history of the enabling statute also reveals no intent to emphasize retribution, abandon utilitarian goals, or dramatically change any existing sentencing norms. The 1978 act was the culmination of several years of legislative ferment over sentencing reform, reflecting increasing dissatisfaction with indeterminate sentencing, but disagreement over what to do about it (see, generally, Clark 1979; Martin 1984; Parent 1988, pp. 21–27). Sentencing purposes were apparently rarely debated as such; what consensus there was seemed to focus on abolishing the parole board and increasing the uniformity of sentences, without any overall increase in sentencing severity or prison populations and, it seems, also without agreement for changing the sentencing of any particular offenses or offenders (Martin 1984, p. 111).

It should also be noted that the 1978 legislature did not change the purposes clause of the state's criminal code (Minn. Stat., sec. 609.01, subd. 1). That clause continued to endorse the goals of deterrence, rehabilitation, and confinement for public safety (incapacitation), and its only reference to retribution is as a severity-limiting principle—the code should “protect the individual against the misuse of the criminal law by . . . authorizing sentences reasonably related to the conduct and character of the convicted person.” Nor did the legislature delete or amend the references to rehabilitation contained in the statute governing presentence investigations; instead, such investigations were made mandatory in felony cases (Minn. Stat., sec. 609.115, subd. 1).

In view of these statutory provisions and the goals expressed by proponents of sentencing reforms, it appears that the most probable legislative purposes in enacting the 1978 enabling statute were as follows: first, to limit sharply judicial and parole discretion in the pursuit of all traditional purposes of punishment without abandoning any of these purposes or clearly emphasizing some over others; second, to emphasize that a state prison sentence is imposed primarily to achieve retribution, deterrence, and incapacitation and is not imposed to achieve forced rehabilitation, rehabilitation being normally expected to be pursued outside of prison; third, to consider other changes in sentencing policy, without departing too much from existing practices; and, fourth, to recognize while pursuing these goals, that punishment,

especially in prisons and jails, is expensive and that overcrowding of facilities and other resources must be avoided even if this means at least a temporary failure fully to achieve punishment goals.

III. Development

Minnesota was the first jurisdiction to implement statewide, legally binding guidelines written by an independent sentencing commission. This process has been well described by Dale Parent (1988) and others, but a brief review is useful because many essential features of guidelines and guidelines drafting originated in Minnesota.

A. Drafting

Pursuant to the statutory mandate summarized above, the commission promulgated a set of guidelines built around a matrix similar to the current grid shown in table 1 (however, in the original grid offense severity increased, rather than decreased, from the top to the bottom row of the grid). The decision to adopt this two-dimensional grid format was influenced by the existing federal and state parole guidelines, previous experiments with voluntary sentencing guidelines, and the statutory directives to base the recommended sentences on "reasonable offense and offender characteristics" and to take into "substantial consideration" existing sentencing and releasing practices. The commission's research into those practices revealed that the conviction offense and the offender's prior record were the two most influential factors in determining judicial decisions to impose a prison sentence and parole board decisions to release an inmate from prison (MSGC 1979, 1980, p. 30).

One of the commission's earliest decisions was to adopt a "prescriptive" rather than a "descriptive" approach (MSGC 1980, pp. 2-3; 1984, pp. v, 8-14). That is, the new guidelines were not expected simply to model and perpetuate past judicial and parole decisions (or the average of prior decisions). Although prior practices were taken into account, the commission made a number of independent decisions about which offenders ought to go to prison, and for how long, and what the primary purposes of punishment ought to be. The new guidelines were thus intended to be norm-changing, not simply norm-reinforcing. However, the commission appeared to interpret the reference to correctional resources more strictly than the statute required; almost from the beginning, it was assumed that the guidelines should produce state prison populations that remained well within (no more than 95 percent

of) prison capacity. A detailed, computerized projection model was developed and used throughout the drafting process to test the expected prison population that would result from each proposed guidelines rule or procedure. Finally, although the commission made a number of "non-presumptive recommendations" as to their conditions, it chose not to exercise its authority to develop presumptive guidelines for nonprison sentences. The reason given was lack of time (MSGC 1980, p. 22). The commission had only fifteen months in which to prepare and submit its report to the legislature (Parent 1988, p. 33). But it was a fateful choice; the commission has revisited this issue several times since, but guidelines for nonprison sentences have never been proposed.

In addition to its emphasis on just deserts, the commission made several important "prescriptive" changes to preexisting sentencing policy. First, the rank-ordering of offense severity was based entirely on the commission's own sense of the "seriousness" of each crime (MSGC 1980, pp. 6-7; Parent 1988, pp. 51-63). The commission never said exactly how these rankings differed from those implicit in prior imprisonment and parole release decisions, but comparison of commission rankings with the average preguidelines prison rates and durations for each offense reveals some substantial differences.³

Second, although the commission's definition of criminal history was based primarily on the number of prior felony convictions, it also included up to one criminal history point for "custody status" (on parole, probation, etc., at time of current offense), prior misdemeanor and gross misdemeanor convictions, and prior juvenile felony-level adjudications. Misdemeanor convictions had not been a major factor in prior sentencing practice, but the commission decided that they ought to be considered to some extent (MSGC 1980, p. 7).

Third, the commission excluded consideration of the defendant's education, marital status, and employment status at the time of the offense or at sentencing, even though the last was a significant factor in prior dispositional decisions (MSGC 1980, p. 5). The commission believed that such "social status" variables should not bear on the sentencing decision, since they tend to be correlated with race and

³ For example, child sex abuse cases received a severity rank of ninety-four out of 100 and were placed in severity level *VIII (presumptive executed prison sentence, even for a first offense); in the commission's 1978 baseline sample, however, only 45 percent of these cases received executed terms. (Former levels VII-X, in pre-2002 versions of the guidelines, are indicated with an asterisk, preceding the severity level number.)

income level. The commission adopted a broad prescriptive norm that "sentencing should be neutral with respect to race, gender, social, or economic status" (MSGC 2003*b*, sec. I[1]).

Fourth, in deciding on the location of the disposition line on the guidelines grid, which separates presumptive stayed from presumptive executed prison terms, the commission emphasized a "flatter" (more desert-oriented) slope and specifically chose to send more low-criminal-history "person" offenders and fewer recidivist property offenders to prison (MSGC 1980, pp. 9–10, 15; 1984, pp. 10–14, 21).

Despite the commission's avowed emphasis on retribution, the commission did not abandon utilitarian sentencing goals. Nor is it likely that the commission expected that most offenders would receive their full just deserts. The guidelines were written in such a way that over 80 percent of defendants were expected to have presumptive nonprison (stayed) sentences.⁴ The "deserved" sentence for these offenders is defined only in terms of the presumptive duration provided for cases where an aggravated dispositional departure is ordered or the initial stay of prison is later revoked; the guidelines recommend and assume that such departures and revocations will be rare. In the absence of departure or revocation, the guidelines do not specify any particular sentence for these defendants. Under Minnesota sentencing laws, such defendants may receive up to twelve months in jail—or no jail at all. They may also be required to undergo residential or outpatient treatment; comply with strict supervised probation; pay restitution, fines, and/or costs; and perform community work obligations—or none of these alternatives. Moreover, less than half of preguideline defendants analyzed by the commission received any jail time. Thus, the commission must have expected a large number of defendants to receive less than their full just deserts (as measured by their presumptive stayed prison duration). For these defendants, retributive standards set the upper limit of severity but do not further define the sentence.

As for sentencing theory, the guidelines provide the following advice on the sentencing of cases with presumptive stayed prison terms: "There are several penal objectives to be considered in establishing conditions of stayed sentences, including but not limited to, retribution, rehabilitation, public protection, restitution, deterrence, and public condemnation of criminal conduct . . . the relative importance of these

⁴ Presumptive stays would have applied to 83 percent of the cases in the preguidelines baseline data set (1978); in the first year after the guidelines became effective, 85 percent of defendants had presumptive stayed sentences.

objectives may vary with both offense and offender characteristics, [and] multiple objectives may be present in any given sentence" (MSGC 2003*b*, sec. III.A.2). This, of course, is a classic statement of traditional indeterminate sentencing theory and reflects a clear endorsement, in the context of nonprison sentences, of all of the utilitarian goals of punishment. Thus, for most defendants, the guidelines essentially retain the traditional indeterminate sentencing system and its utilitarian values, subject only to retributive "caps" set by the presumptive duration of stayed prison terms.

Even for the minority of defendants with presumptive executed prison terms, the commission must have recognized that these penalties could be, and probably would be, avoided in many cases through charging and plea bargaining concessions (which are not regulated at all under the guidelines). Moreover, the commission must have expected that prosecutors could, and probably would, sometimes consider offender-based, utilitarian sentencing goals in deciding whether to grant or deny such concessions.

Thus, it is a considerable oversimplification to say that the original Minnesota guidelines reflected a "retributive-just deserts" philosophy, or even "primarily" a just deserts philosophy (cf. MSGC 1980, p. 9; 1984, pp. v, 10-14). The guidelines, as written, were actually more consistent with the limiting retributivism theory suggested in Morris's writings (1974, pp. 73-76; 1982, p. 199; Frase 1997, pp. 407-26).⁵ For most defendants, considerations of just desert set only upper limits. Within those limits, courts and prosecutors were expected to continue to pursue utilitarian purposes of punishment, especially rehabilitation, and were guided by a general principle of restraint and economy, which Morris calls "parsimony": sanctions "should be the least restrictive necessary to achieve the purposes of the sentence" (Morris 1974, pp. 59-62; MSGC 2003*b*, secs. I[4], III.A.2). However, as Morris stipulated (1974, pp. 12-27, 59-73), no one was to be sent to prison either for coerced treatment or on the basis of individualized predictions of dangerousness, nor was the duration of imprisonment to be based on treatment or dangerousness assessments. The primary purposes of a state prison sentence were viewed as retribution, general

⁵ In previous writings (Frase 1997, 2004), I have provided a comprehensive statement of Morris's theory and a detailed comparison between his theory and the Minnesota approach. See also Reitz (2003, pp. 36-41), who proposes Morris's approach as the underlying theory of the revised Model Penal Code sentencing and corrections provisions.

deterrence, and incapacitation, but its duration was to be measured primarily by retributive standards. Subsequent legislative enactments, interpretive case law, and sentencing practices have further reinforced Minnesota's limiting retributive model.

B. Legislative Approval and Implementation

The enabling act directed the commission to submit its proposed guidelines by January 1, 1980, and provided that these guidelines would go into effect for all crimes committed on and after May 1 of that year unless the legislature provided otherwise (Minn. Stat., sec. 244.09, subds. 5, 12). The legislature did not so provide, and thus the guidelines became effective without modification (MSGC 1984, pp. 15-16; Parent 1988, pp. 136-39).

Several factors accounted for this easy approval. First, the requirement of legislative override (rather than affirmative approval) meant that the leaders and majorities in both houses would have to agree to any delay, modification, or rejection. Second, the commission chair, Jan Smaby, had extensive lobbying experience as well as political and media connections, and she worked closely with legislative leaders from late 1979 through the spring of 1980 (Parent 1988, pp. 31, 136). Third, most of the senate leaders active in the sentencing reform debates of the 1970s were still in leadership positions and supported the guidelines. Fourth, there was no organized opposition to the commission's proposals from any major professional or interest group.

The absence of organized opposition resulted in part from the design of the commission, whose membership reflected most of the major constituencies affected by the guidelines. Moreover, the commission had worked closely with each of these constituencies while drafting the guidelines, seeking to incorporate their objections, to explain the commission's goals, and to show the advantages to each constituency of the new rules. Because judges were not expected to mount any organized opposition, more time was spent developing support from prosecutors, law enforcement officials, and defense attorneys. The limited degree of judicial opposition was calmed through the efforts of commission member Douglas Amdahl, who was then a district court judge and later became chief justice of the state supreme court (Tonry 1996, pp. 166-69). In addition, the commission held many public hearings around the state during the development phase and did so again after implementation began. This "aggressively open" political approach (MSGC 1984, p. 15; Parent 1988, pp. 45-48) provided

opportunities to receive input from and provide information to constituencies that were not specifically represented on the commission (e.g., the police, crime victims). Throughout the development and implementation phases, whenever factual questions arose, the commission could respond authoritatively using its unique and extensive baseline data and prison population projections (Parent 1988, p. 144).

Shortly after the guidelines took effect, they were subject to political attack (Parent 1988, pp. 140–43). In the summer of 1980, a statewide Republican Party radio ad suggested that the guidelines would prevent imprisonment for the first three offenses of selling hard drugs to small children, or of forcible child prostitution. The ad blamed Democratic legislators for the guidelines and urged listeners to vote Republican in the upcoming elections. The commissioner of corrections, Jack Young—himself a Republican—requested that the commission send a letter to the party and to the media, stressing the bipartisan support for the guidelines, pointing out the misleading features of the radio ad, and urging the party to refrain from such distorted attacks. These views were echoed by editorials in the state's two major newspapers, and the guidelines ceased to be a statewide campaign issue.

Implementation of the guidelines required extensive, statewide training of all judges, prosecutors, defense attorneys, and probation officers, and this critical task could not begin until after May 1, when the threat of legislative override or delay was past. But with help from organizations representing each group of personnel, training was complete before very many offenses covered by the new rules had progressed to the trial and sentencing stage (MSGC 1980, p. 20; 1984, pp. 16–17; Parent 1988, pp. 237–39).

After guidelines sentences started to be handed down, another critical phase of implementation began. As specified by the enabling statute, the commission began monitoring and evaluating sentences imposed and their impacts on system functioning and resources. These ongoing assessments operate at both the case level and system wide, and they serve several critical functions: to enforce the guidelines, to achieve the goal of matching sentencing practice with available correctional resources, and to facilitate improvements in the guidelines or their operation (MSGC 1980, p. 20). The enforcement function is served by requesting missing sentencing work sheets and departure reports, examining work sheets for errors, and studying rates and patterns of departure. Beyond correcting mistakes, these activities can reveal the need for additional training or clarification of certain provisions (Parent

1988, pp. 239–41). During the first two years, commission staff reviewed all sentencing work sheets; the error rate was over 50 percent at first but fell to 3–4 percent after eighteen months (MSGC 1984, p. 17, n. 23).

To facilitate its monitoring and evaluation functions, the commission began to collect and compile extensive data on all sentences imposed each year, supplemented by even more detailed, in-depth data for certain years, counties, and crimes. This data gathering provided the commission with what was probably the most extensive sentencing and corrections database that had ever been assembled at the state level. These data have helped ensure that guidelines policy making is as well informed in the postimplementation phase as it was during the guidelines' development. The commission uses these data to monitor departure rates and other indices of disparity; to apply and refine the prison population projection model; occasionally to assess other aspects of system functioning such as changes in trial and appeal rates, processing delays, charging, and plea bargaining; to inform the commission's decisions whether and how to modify the guidelines; and to advise the legislature on the probable resource impact of proposed statutory changes (Knapp 1987).

An important issue in the implementation phase of any major sentencing reform relates to the treatment of offenders sentenced under prior laws—to what extent will they be allowed to benefit, retroactively, from lowered penalties imposed under the new law? The constitutional ban on *ex post facto* laws prohibits the imposition of increased penalties on previously sentenced offenders. The enabling statute declined to order automatic retroactivity but directed the corrections board to "take into consideration, but not be bound by" the guidelines when setting parole dates for preguidelines offenders (Minn. Stat., sec. 244.08, subd. 1). (Since 1982, these decisions are made by the commissioner of corrections.) In the summer of 1980, about three-quarters of the 2,000 state prison inmates were reviewed; about one-third of these would have had presumptive nonprison sentences under the guidelines, but release dates were accelerated in only ninety-five cases (MSGC 1984, pp. 103–4). In 1981, the legislature amended the postconviction remedy statute (Minn. Stat., sec. 590.01, subd. 3) so that old-law inmates could use it to request resentencing in light of the guidelines. However, to grant relief, the court had to make a finding that release would "not present a danger to the public" (the statute made no mention of uniformity or proportionality considerations). In the next two years, 300 inmates out of about 1,400 pre-1980 cases were

resentenced; denials of release were always upheld on appeal (MSGC 1984, pp. 104–5).

In 1983, the legislature agreed to retroactive application of reductions in guidelines sentences, but only for offenders who had been sentenced under the guidelines. All but sixty-eight of the offenders eligible at that point were resentenced, and a few more won resentencing on appeal (MSGC 1984, pp. 105–6). But one year later this retroactivity law was repealed and replaced with the stricter (no-public-danger) provisions of the postconviction remedy statute (1984 Minn. Laws, ch. 589, secs. 4, 5). Even this limited degree of retroactivity was later eliminated (1997 Minn. Laws, ch. 239, art. 3, sec. 25).

IV. Postimplementation Changes

The sentencing system in Minnesota has changed considerably since 1980 through a combination of legislative, commission, and judicial decisions. The contributions of appellate case law are described first, since they have arisen largely independent of legislative and commission activities (but have sometimes directly or indirectly prompted action by the legislature or the commission). Although legislative and commission decisions operate in distinctly different ways, and at different levels of policy making, they are so closely intertwined that they must be described in a single chronology, which is divided into two periods—the relatively quiet early years and the more turbulent period beginning in late 1988. Major legislative and guidelines proposals that were not adopted are also noted.

A. Appellate Case Law

Almost all of the important appellate cases were decided in the first two years after they became effective and thus were controlled entirely by the Minnesota Supreme Court (the new intermediate-level court of appeals did not begin issuing opinions until February 1984). And most of the court's decisions were written by Chief Justice Amdahl, who joined the court in 1981. Before that, as a district court judge, Amdahl had been an influential member of the commission since its inception in 1978. He thus brought to the court a deep understanding of and commitment to the guidelines.

The cases described below fall into four categories: decisions that identify prohibited grounds for departure (in addition to those already listed in the guidelines; MSGC 2003*b*, sec. II.D.1), recognize additional permissible grounds for departure (beyond the mitigating and

aggravating factors in guidelines sec. II.D.2), clarify other aspects of trial court powers to depart or refuse to depart, and interpret other important aspects of the guidelines or related sentencing laws.

1. *Prohibited Departure Grounds.* The state supreme court almost immediately established the principle that sentencing should be based on the conviction offense and that aggravated departures should not be based on the details of offenses dismissed or never filed (so-called real-offense sentencing).⁶ The court also established that departures could not be based on assessments of the individual defendant's dangerousness (*State v. Hagen*, 317 N.W.2d 701, 703 [Minn. 1982]), on special needs for deterrence, on the need for extended in-prison treatment (*State v. Schmit*, 329 N.W.2d 56, 58 n. 1 [Minn. 1983]; *State v. Barnes*, 313 N.W.2d 1 [Minn. 1981]), or on factors that had already been taken into account in drafting the guidelines (MSGC 1984, pp. 121, 124; *State v. Cizl*, 304 N.W.2d 632 [Minn. 1981], absence of criminal history; *State v. Hagen*, 317 N.W.2d 701 [Minn. 1982], age of victim, which is already an offense element).

In an early case, the court had stated that plea bargaining is an invalid basis for departure (*State v. Garcia*, 302 N.W.2d 643 [Minn. 1981]). But in *State v. Givens* (544 N.W.2d 774 [Minn. 1996]) the court upheld an upward durational departure to which the defendant had agreed (in return for a stayed prison sentence, which was later revoked). *Givens* was subsequently limited by legislation and an amendment of the guidelines commentary. In response to these changes, the court overruled *Givens* in *State v. Misquidace* (644 N.W.2d 65, 71 [Minn. 2002]) and held that a

⁶ *State v. Womack*, 319 N.W.2d 17 (Minn. 1982). See generally, MSGC 1984, pp. 111–13. However, limited real-offense sentencing is permitted under the guidelines. For example, some offense severity rankings depend on dollar amounts of loss, which are not elements of the conviction offense (see MSGC 2003b, sec. V [Theft and Theft Related Offenses], 2003c). And several of the commission-approved grounds for upward departure involve aggravating factors, which are not elements of the conviction offense (e.g., particular vulnerability of victim), and which may not even be part of the same course of conduct charged (e.g., “major economic offense” by defendant involved in other, similar conduct as evidenced by findings of prior civil, administrative, or disciplinary proceedings; MSGC 2003b, secs. II.D.2.b[1] and [4][e]; 2003c). See also *State v. Garcia* (302 N.W.2d 643 [Minn. 1981]), upholding upward departure based on unconvicted crimes, which the defendant had admitted on the record; see also Reitz (1993, p. 540, n. 107), who discusses several cases allowing sentence enhancement for victim injuries or separate assaults not fully reflected by the defendants’ conviction offenses. However, the Supreme Court’s recent decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), appears to forbid all such real-offense enhancements in Minnesota and other presumptive guidelines systems. After *Blakely*, aggravating circumstances must either be admitted by the defendant or submitted to the jury (or to the judge, if jury trial is waived) and proven beyond a reasonable doubt.

plea agreement, standing alone, is not a sufficient basis for an upward dispositional or durational departure.

2. *Permissible Departure Grounds.* In a series of very important early cases, the court held that dispositional departures—but not durational departures—may be based on individualized assessments of the offender's amenability to probation or prison.⁷ *State v. Park* (305 N.W.2d 775 [Minn. 1981]) upheld an upward dispositional departure (commitment to prison, rather than the presumptive stayed term) based on the defendant's unamenability to probation (including his prior failure on probation and unwillingness to admit his chemical dependency problem). In *State v. Wright* (310 N.W.2d 461 [Minn. 1981]), the court upheld a downward dispositional departure based on findings that the defendant was unusually vulnerable and was therefore unamenable to prison and that he was particularly amenable to treatment in a probationary setting. *State v. Trog* (323 N.W.2d 28 [Minn. 1982]) upheld a downward dispositional departure based solely on the defendant's particular amenability to probation (emphasizing the uncharacteristic nature of the defendant's crime rather than any particular treatment needs). Commission data on trial court reasons for departure indicate that amenable-to-probation findings are quite common, constituting as many as one-half of all downward dispositional departures in some years.

The commission has expressed serious reservations about amenability departures, because they are not justified on desert grounds (MSGC 1984, pp. vi, 117–18). Moreover, such departures often appear to be based, at least indirectly, on prohibited factors such as family circumstances and employment. In 1989, the commission amended the guidelines commentary to provide that no amenability departure is valid unless the court “demonstrate[s] that the departure is not based on any of the excluded [social or economic] factors.” But the commission declined either to prohibit such departures or to propose criteria for their use (see MSGC 1989, pp. 17–18).

⁷ In justifying the distinction between durational and disposition departures, Justice Amdahl noted that the guidelines' lists of permissible mitigating and aggravating factors (MSGC 2003b, sec. II.D, 2003c) relate primarily to the defendant's degree of culpability, but he argued that “when justifying only a dispositional departure, the trial court can focus more on the defendant as an individual and on whether the presumptive sentence would be best for him and for society” (*State v. Heywood*, 338 N.W.2d 243, 244 [Minn. 1983]). The amenability cases are discussed at length in Frase (1991b, pp. 740–48). A similar line of early cases under the federal sentencing guidelines (some of which were later overruled by higher courts or the U.S. sentencing commission) is discussed in Frase (1991a).

Another important decision relating to dispositional departures, *State v. Randolph* (316 N.W.2d 508 [Minn. 1982]), held that courts must grant a defendant's request for execution of the presumptive stayed prison term when the trial court's proposed conditions of the stay are so onerous that they are, in effect, more severe than the prison term would be. Such defendant requests account for a high proportion of upward dispositional departures (Frase 1993a, p. 314; MSGC 2003c, p. 23). The *Randolph* decision was limited by subsequent legislation specifying that defendants may not request sentence execution if they would serve less than nine months in prison (unless that short term is concurrent or consecutive to another sentence; Minn. Stat., sec. 609.135, subd. 7).⁸

3. *Other Departure Issues.* Departures require a finding of "substantial and compelling circumstances," but in the case of durational departures there is a separate question of the proper degree of departure. The amenability cases hold that decisions to depart durationally should be governed by principles of desert (*State v. Heywood*, 338 N.W.2d 243, 244 [Minn. 1983]), and presumably the same desert principles govern the degree of departure. However, in *State v. Evans* (311 N.W.2d 481, 483 [Minn. 1981]), the court decided to provide trial court with additional guidance and held that upward durational departures should normally not exceed twice the presumptive duration (in cells above the disposition line, this refers to the single [middle] figure, not the upper end of the permissible range); however, in "rare cases" trial courts may depart all the way up to the statutory maximum.

The opposite side of the departure power arises when the trial court declines to depart and imposes the presumptive sentence (or a sentence within the permitted range). Decisions not to depart were largely insulated from appellate scrutiny by the court's statement, in *State v. Kindem* (313 N.W.2d 6, 7 [Minn. 1981]), that "[although] we do not intend to entirely close the door . . . it would be a rare case which would warrant reversal of the refusal to depart." This decision implies a strong presumption in favor of the recommended guidelines sentence and a preference for the values of uniformity and system efficiency over optimum sentence proportionality and utility.

⁸ Similar concerns about large numbers of very short prison commitments led the legislature subsequently to require that any offender committed to the state with less than 180 days remaining to serve (after credit for pretrial detention time) serve that term in a jail, workhouse, or other designated facility (2003 Minn. Laws, 1st Sp. Sess., ch. 2, art. 5, secs. 7-9).

4. *Other Important Decisions.* The original guidelines did not specify whether multiple current offenses enter into the offender's criminal history score when these offenses are sentenced concurrently in a single sentencing hearing. In *State v. Hernandez* (311 N.W.2d 478 [Minn. 1981]), the court held that such an offender's criminal history score increases with each additional offense sentenced concurrently. For example, a defendant with no previous convictions who was sentenced concurrently on four one-point (level-V) residential burglary counts would have a criminal history of three (moving him across the disposition line) by the time he was sentenced on the fourth count. Prior to *Hernandez*, prosecutors could achieve the same result through serialized prosecutions with separate sentencing hearings for each offense. And, of course, additional concurrent counts sentenced in a single hearing would increase the defendant's future criminal history if he committed further offenses. But the *Hernandez* rule increases the immediate sentencing impact (and plea bargaining leverage) of multiple counts. *Hernandez* also helps prosecutors target high-rate offenders and, thus, further emphasizes the utilitarian (incapacitative) effect of the criminal history score under the guidelines. But utilitarian goals were clearly already present. Even under the original guidelines, "prior" felony and misdemeanor convictions were counted as of the date of sentencing rather than as of the date of the current offense, which would be required under a purely retributive model (Parent 1988, p. 163).

Drug penalties became increasingly severe in the 1980s, particularly for crack cocaine offenses. In *State v. Russell* (477 N.W.2d 886 [Minn. 1991]) the state supreme court held that state statutes and guidelines rules imposing much heavier penalties for crack than for powdered cocaine offenses violated the state constitution. The court noted that these penalty differences had a strongly disparate impact on blacks, who constituted the vast majority of crack offenders, and it concluded that the state had not shown sufficient grounds for punishing crack offenses so much more harshly. However, shortly after the *Russell* decision, the legislature raised powder penalties to equal crack penalties.

B. Changes from 1980 through 1988

A key issue in any commission-based sentencing system involves the division of labor between the legislature and the commission. The 1978 enabling act allowed the legislature to veto or amend the initial

set of guidelines but was silent as to the legislature's role in proposing or approving subsequent changes. In 1982, the commission and the legislature agreed on a procedure under which the legislature could require that the commission either adopt certain amendments or report why it had not done so (Parent 1988, p. 50). A later statute (1984 Minn. Laws, ch. 589, sec. 4) imposed additional legislative control: it provided that all changes in the guidelines grid, and any other modifications resulting in reduced sentences or early release of any inmate, must be submitted to the legislature by January 1 to become effective August 1 of that year unless the legislature by law provides otherwise.

The most important changes made by the commission itself in this early period involved the durations of presumptive prison terms.⁹ The durations at severity levels I–III, with medium to high criminal history, were lowered by from one to seven months in order to stay within prison capacity limits (MSGC 1984, pp. 91–92); durations in certain cells at severity levels *IX and *X¹⁰ and for attempted first-degree murder were increased by varying amounts ranging between eight and 100 months (MSGC 1986, pp. 11–12, 27).

There were other major legislative changes from 1980 through 1988. First, in 1981, the statute requiring a mandatory minimum prison term for use of a dangerous weapon was amended to increase terms for use of a firearm, increase the number of offenses to which the statute applies, and authorize courts to depart from the mandatory minimum prison term on the prosecutor's motion.¹¹ Second, also in 1981, the separate offense of intrafamilial sexual abuse (IFSA) was created, paralleling the existing Criminal Sexual Conduct statutes but with a provision that the court may impose a stayed prison sentence if it finds that this is "in the best interest of the complainant or the family

⁹ In addition, one cell was moved across the disposition line: severity level I, with criminal history of six or more, became eligible for a presumptive executed prison sentence. Also, aggravating factors were added for drug crimes, violent crimes for hire, and gang-related offenses.

¹⁰ In 2002 a new severity level, VII, was created for felony DWI cases, and former levels VII–X became levels VIII–XI. Throughout this essay, references to former levels VII–X are indicated with an asterisk (e.g., level *VIII).

¹¹ Minn. Stat., sec. 609.11, subd. 8. The statutory "sentence apart" provision was added in response to a state supreme court decision holding that the weapons statute was truly mandatory and did not permit probation (*State v. Jonason*, 292 N.W.2d 730 [Minn. 1980]). In 1982, the supreme court ruled that trial courts may depart on their own initiative, with no prosecution motion (*State v. Olson*, 325 N.W.2d 13 [Minn. 1982]). In 1994, this statute was amended to deny probation to repeat weapons offenders, with or without prosecution motion (Minn. Stat., sec. 609.11, subd. 8[a]).

unit.”¹² In 1985, further requirements for such stayed sentences were added: a “professional assessment” must indicate that the offender “has been accepted by and can respond to a treatment program,” and the court must order the defendant to complete the program and spend some period of time in jail. Third, in 1987, the legislature added a similar “amenable to treatment” provision to the statute imposing a mandatory minimum prison term on repeat sex offenders.¹³ Finally, in 1985, 1986, and 1987, the legislature adopted substantially increased penalties for cocaine and certain other drug offenses (MSGC 1992, pp. 3–4).

C. Changes since 1988

Significant changes have been made since 1988. Many of the most fundamental occurred in 1988–99, when the legislature responded both to the toughening on crime ethos at the time and to a series of notorious crimes in Minnesota.

1. *1988–89 Changes.* In 1988, public pressures for substantially increased penalties and legislative demands for increased control over sentencing policy began to escalate. The commission had faced similar political pressures earlier (Parent 1988, pp. 140–46), but the “crime wave” of 1988 proved too broad and too sustained to resist. Pressure began to build in late spring, with a series of sexual attacks on women in Minneapolis parking ramps, two of them fatal. The Minnesota attorney general appointed a task force on sexual violence against women, which began submitting strongly worded demands to the legislature and the commission for substantially increased rape sentences (Minnesota

¹² Minn. Stat. 609.364 to .3644 (repealed in 1985 and replaced by similarly worded provisions in the criminal sexual conduct statutes; see, e.g., Minn. Stat. 609.342, subds. 1[g] and 3, authorizing stays for certain first-degree offenders with a “significant relationship” to the complainant).

¹³ Minn. Stat. 609.346, subd. 2 (this provision is now found at Minn. Stat. 609.109, subd. 2). Even before this statutory change, the court had held in *State v. Feinstein* (338 N.W.2d 244 [Minn. 1983]) that trial courts may grant probation to repeat sex offenders despite the mandatory minimum statute. See also *State v. Childers*, 309 N.W.2d 37 (Minn. 1981) (the court may grant probation despite the mandatory minimum statute for repeat drug offenders); *State v. Bluhm*, 663 N.W.2d 24 (Minn. App. 2003) (the power to grant probation remains despite 1989 statute, Minn. Stat. 152.026, which seemed expressly to preclude probation eligibility). In all such cases, however, trial courts must comply with the guidelines requirements for a mitigated dispositional departure (*State v. Bluhm*, 663 N.W.2d at 30). In 1989, a provision was added requiring similar amenability and program acceptance findings in order to avoid a presumptive prison term for a first drug offense of the first-, second-, or third-degree, and requiring a jail term as a condition of probation (Minn. Stat., sec. 152.152).

Attorney General 1989). At the same time, the City of Minneapolis experienced what seemed like a general increase in violence and drug crime: the 1988 murder rate was 50 percent higher than in 1987, and drug offenses were up 60 percent (Frase 1993*b*, p. 359).

In November, the commission responded by proposing to increase prison durations for violent crime while reducing terms for property offenders in order to stay within prison capacity. For example, the presumptive sentence (before reduction for good time) for a first-degree rapist with zero criminal history would have increased to 4.5 years (from 3.5 years). However, these proposals did not satisfy the hue and cry and were met with calls to double sentences for violent offenders (*Minneapolis Star Tribune* 1988). In December of 1988, the commission responded by approving increases in all durations at severity levels *VII (e.g., armed robbery) and *VIII (first-degree rape); durations were doubled for defendants with zero criminal history and were also increased substantially (but by lesser percentages) for higher criminal histories. The commission also adopted a criminal history weighting scheme, valuing prior felony convictions at one-half point, for severity levels I and II, and increasing to two points for levels *VIII to *X. These weights were designed largely to counter the substantial increase in property offenders with high criminal histories and presumptive-commit sentences (which had resulted in part from sentencing under the *Hernandez* case; see Frase 1993*a*, p. 324). These and other changes were to become effective as of August 1, 1989.¹⁴

But the pressure for increased sentence severity and legislative control did not let up. In the spring of 1989, the legislature considered a number of "get tough" crime bills, including two which would have reestablished the death penalty (not used in Minnesota since 1911; 1989 Minn. Senate File No. 768; 1989 House File No. 998). The final omnibus crime bill included a number of severe measures, which may well have been the price of defeating the death penalty bills: life without parole for some first-degree murderers (and, for the rest, an increased minimum term of thirty years), mandatory maximum terms

¹⁴ The commission also amended the guidelines commentary to discourage (but not prohibit) amenability departures (see discussion in Sec. IV.A). Other changes made by the commission at this time included the adoption of a "misdemeanor and gross misdemeanor offense list" (MSGC 2003*b*, sec. V; limiting the offenses that may be considered in calculating the misdemeanor criminal history point); allowing offenders to receive up to two points for juvenile felony-level adjudications, if at least one was for a serious violent crime; and adding a mitigating dispositional departure factor for crime "spree" offenders at severity levels I-IV.

for other recidivist murderers and sex offenders, and increased statutory maximums for other violent and sex crimes (1989 Minn. Laws, ch. 290, art. 2, secs. 6, 10, 12, 14; art. 4, secs. 12–15; art. 6, secs. 5–19).

The 1989 crime bill also provided extended terms and mandatory minimum prison terms for certain sex-motivated crimes when the court finds, based on a professional assessment, that the defendant is a “patterned sex offender” who “needs long-term treatment or supervision” and is a “danger to public safety” (1989 Minn. Laws, ch. 290, art. 4, sec. 10). Such a finding must be based either on the presence of one or more aggravating factors in the present offense, or on the commission of a previous violent crime. However, early release (after only half of the pronounced prison term has been served) is allowed if “the offender is amenable to treatment and has made sufficient progress in a [prison] sex offender treatment program . . . to be released [to a community program].” Such offenders are then subject to an extended period of conditional release for the remainder of the statutory maximum or ten years, whichever is longer (1989 Minn. Laws, ch. 290, art. 4, secs. 3, 10).

The crime bill contained further provisions that authorized judges to make individualized assessments of dangerousness in setting prison durations (1989 Minn. Laws, ch. 290, art. 2, sec. 9, subds. 2, 3). Courts were authorized to impose the statutory maximum term for certain violent crimes on a finding that the defendant is “a danger to public safety” (based on his past criminal behavior or the presence of at least one aggravating factor in the present offense). Judges were also permitted to impose the maximum term for any other felony if the defendant has more than four prior felony convictions and the court finds that the present offense “was committed as part of a pattern of criminal conduct from which a substantial portion of the offender’s income was derived” (the income requirement was later deleted; 1992 Minn. Laws, ch. 571, art. 2, sec. 10). All of these changes, like the amenability provisions adopted for sex offenders in the mid-1980s, suggested that the legislature continued to accept individualized rehabilitative and incapacitative sentencing, albeit under stricter limits than applied prior to the guidelines.

The crime bill also further toughened penalties for drug crimes (1989 Minn. Laws, ch. 290, art. 3, secs. 13, 20, 28; MSGC 2004*b*, p. 8). Five degrees of crime were recognized. All first-, second-, and third-degree possession offenders were presumed, from the drug amount alone, to be dealers; these offenses were ranked at severity levels *VIII, *VII, and VI,

respectively, with presumptive prison sentences, for a first offender, set at eighty-six months executed, forty-eight months executed, and twenty-one months stayed. Previously, the presumptive sentence for the most serious drug offense by a first offender had been twenty-four months executed prison. In addition, minimum prison terms were prescribed for certain drug offenders, and required jail terms were prescribed for others.

Finally, the 1989 crime bill contained several provisions suggesting that the legislature no longer trusted the commission to set sufficiently severe presumptive sentences and had decided to take back some of the delegated power to set specific guidelines and overall sentencing policy. The enabling act was amended to specify that the commission's "primary" goal in setting guidelines should be public safety; correctional resources and current practices remain as factors, but they are no longer to be taken into "substantial" consideration (1989 Minn. Laws, ch. 290, art. 2, sec. 8). A later amendment added that the commission should also consider "the long-term negative impact of crime on the community" (1996 Minn. Laws, ch. 408, art. 3, sec. 11). The commission was also directed to increase penalties at severity levels *IX and *X by specified amounts and to add a specific provision to the guidelines list of aggravating circumstances (1989 Minn. Laws, ch. 290, art. 2, sec. 17, art. 3, sec. 25). In addition, judges were given authority in certain cases to impose the statutory maximum prison term, apparently without regard to ordinary guidelines rules governing departure and degree of departure (1989 Minn. Laws, ch. 290, art. 2, sec. 9, and art. 4, sec. 10).

2. *1990 and 1991 Legislation.* The legislature's principal 1990 crime bill seemed further to endorse individualized assessments of dangerousness and treatability. Central to this bill was a set of provisions authorizing and minutely structuring "intensive community supervision" (ICS) under the control of the state commissioner of corrections (1990 Minn. Laws, ch. 568, art. 2, secs. 31-36). Eligible offenders were to include inmates on supervised release, offenders committed to custody following revocation of a stayed prison term, and certain offenders originally committed to prison for terms of twenty-seven months or less.¹⁵ These limitations suggest that the legislature was primarily interested in diverting offenders out of prison, rather than

¹⁵ The first category was later deleted (1991 Minn. Laws, ch. 258, sec. 2), and the third was extended to those with sentences of up to thirty months (1996 Minn. Laws, ch. 636, art. 6, sec. 16).

tightening up supervision of probationers; the legislature apparently had begun to realize the serious prison-population consequences of the major severity increases enacted in 1989.

However, the ICS provisions also demonstrate the legislature's continued commitment to utilitarian, offender-based sentencing goals. The third eligible group defined above is subject to several further limitations, one of which is that defendant's presence in the community not "present a danger to public safety" (1990 Minn. Laws, ch. 568, art. 2, sec. 33, subd. 3[3]). The commissioner of corrections is directed to revoke the release of any offender who fails to follow program rules, commits a new offense, or "presents a risk to the public, based on the offender's behavior, attitude, or abuse of alcohol or controlled substances" (1990 Minn. Laws, ch. 568, art. 2, sec. 35, subd. 3[3]). In administering ICS programs, the commissioner is further directed to pursue four goals: punishment of offenders, public safety, employment of offenders during ICS and afterward, and victim restitution where ordered by the court (1990 Minn. Laws, ch. 568, art. 2, sec. 35, subd. 1).

3. *1992 Legislation.* The 1992 crime bills continued many of these trends and were precipitated by a wave of high-profile violent crimes and media reports similar to the one that sparked the 1989 crime bill. In the summer of 1991, two female college students were kidnapped, raped, and murdered, the first by two local men in her hometown in northern Minnesota, the second by a repeat sex offender just released from prison. In late fall of 1991, the state's principal newspaper published a sensational series of articles entitled "Free to Rape," arguing that Minnesota's sex offender penalties were much too lenient (*Minneapolis Star Tribune* 1991a, 1991b, 1991c).

The principal 1992 crime bill contained a number of "get tough" provisions for sex offenders (although it also expanded treatment, education, and social service programs, and it authorized early release to a new boot camp ["challenge incarceration"] program; 1992 Minn. Laws, ch. 571, art. 11, secs. 5-8). Changes in sex offender sentencing included mandatory doubling of guidelines' presumptive sentences, longer supervised release terms (five years for a first offense, ten years for repeat offenders), increased statutory maxima, and mandatory life and thirty-year prison terms (1992 Minn. Laws, ch. 571, art. 1, secs. 11, 12, 14, 15, 22-25; see also 1992 Minn. Laws [ch. 571, sec. 13] mandating life without parole for certain rape-murderers). Early release of certain amenable sex offenders was eliminated (1992 Minn. Laws, ch. 571, art. 1, sec. 12).

Responding to renewed interest in the goal of "truth in sentencing," the 1992 crime bill included a provision reversing the procedure for applying "good time" credits: instead of pronouncing a longer prison term that could later be reduced by up to one-third, judges were directed to pronounce the sentence in two parts: a minimum term of imprisonment (equal to two-thirds of the presumptive term) and a specified maximum term of supervised release (equal to the remaining one-third). As before, the prison term could be increased, and the release term decreased, based on misconduct in prison (1992 Minn. Laws, ch. 571, art. 2, secs. 1, 7).

The 1992 crime bill appeared to mark a retreat from the legislature's earlier rejection of compulsory in-prison treatment programs. The 1978 enabling act had provided that all such programs should be voluntary. The 1992 bill relabeled these programs as "rehabilitative" (1992 Minn. Laws, ch. 571, art. 2, sec. 2) and permitted the commissioner of corrections to adopt "disciplinary" rules not only for misconduct and refusal to work but also for "refusal to participate in treatment or other rehabilitative programs" (1992 Minn. Laws, ch. 571, art. 2, sec. 6). The act explicitly allowed the commissioner to require prisoners to participate in sex offender programs, discipline those who refuse, and remove "unamenable" prisoners from such programs (1992 Minn. Laws, ch. 571, art. 1, sec. 1).

The 1992 legislature also further increased sentencing severity for drug offenders. In December 1991, the state supreme court had ruled that the statutory and guidelines rules imposing much heavier penalties on crack cocaine offenses than on powdered cocaine violated the state constitution (*State v. Russell*, 477 N.W.2d 886, 888 [Minn. 1991]). This decision provoked an immediate and severe legislative response. In January of 1992, without waiting for the commission's statutorily mandated report on drug sentences (due in February; see MSGC 1992), the legislature enacted a revised drug law that essentially raised powdered cocaine penalties to equal those previously applicable to crack (1992 Minn. Laws, ch. 358). In addition, senate leaders took the unusual step of writing a letter to the commission, urging it to rank certain cocaine offenses so they would receive presumptive executed prison sentences (Frase 1993b, p. 363). The commission chose not to follow the letter's suggestion, but its decision to retain most of the previous rankings applicable to each degree of drug crime resulted in major increases in penalties for powder cases (which the 1992 drug law had shifted to higher degrees).

4. *1993–2003 Changes.* The punitive trend, which began with drug law changes in the mid-1980s and accelerated with the series of laws enacted from 1989 through 1992, continued at a somewhat slower pace for the next decade. At several points, the legislature enacted and then extended the scope of statutes requiring judges to impose fines equal to at least 30 percent of the statutory maximum (Minn. Stat., sec. 609.101). Other laws added additional grounds for permissive consecutive sentences, as well as a few presumptive consecutive sentences (MSGC 2003*b*, sec. II.F), and five additional grounds for aggravated departure (MSGC 2003*b*, secs. II.D.2.b.[8]–[12]).¹⁶

With the adoption of blended sentencing for juveniles as an alternative to waiver to adult court, allowing juvenile courts to impose a stayed adult sentence and retain jurisdiction until age twenty-one, the legislature directed the commission to treat such extended juvenile jurisdiction convictions the same as adult convictions for purposes of criminal history scoring (felony and custody status points; 1995 Minn. Laws, ch. 576, secs. 60, 61). The commission was also directed to make several changes in juvenile point scoring: to count juvenile felonies committed by fourteen- and fifteen-year-olds, to extend expiration of the juvenile criminal history point from age twenty-one to age twenty-five, and to disregard the one- and two-point caps for juvenile history points in the case of juvenile felonies that would be subject to a presumptive prison term if committed by an adult. (The commission interpreted the latter directive to mean presumptive prison regardless of criminal history—crimes ranked at level *VII or higher or subject to a mandatory minimum law; MSGC 1995*a*, pp. 7–8.)

Sentencing of sex offenders and other violent crimes continued to be a concern.¹⁷ A 1992 statute had directed the commission to consider whether penalties should be increased for first-degree criminal sexual

¹⁶ An additional basis for downward departure (“alternative placement for offender with serious and persistent mental illness”) was added in 2003 (MSGC 2004*a*, p. 8). This change—only the second time a mitigating factor has been added since 1980—was prompted by legislation (2003 Minn. Laws, 1st sp. sess., ch. 2, art. 5, sec. 10).

¹⁷ Laws permitting indefinite civil commitment of sexually dangerous persons were also expanded. In two very high-profile cases involving sex offenders, decided in June of 1994, the state supreme court held that the commitment standards required under the state’s “psychopathic personality” law had not been met (*In re Linehan*, 518 N.W.2d 609 [Minn. 1994]; *In re Rickmyer*, 519 N.W.2d 188 [Minn. 1994]). Two months later the legislature, meeting in special session, enacted a broader statute authorizing commitment of “sexually dangerous persons” (1994 Minn. Laws, 1st sp. sess., ch. 1, amending Minn. Stat., sec. 253B.02, subds. 7[a], 18c, and related provisions).

conduct and for second-degree murder. The commission decided that no changes were needed (MSGC 1993, p. 11), but as to sex crimes it was subsequently overruled by the legislature—statutes provided that the presumptive sentences for first-degree and forcible second-degree offenses should be increased to 144 and ninety months, respectively (2000 Minn. Laws, ch. 311, art. 4, sec. 2; 2002 Minn. Laws, ch. 381, sec. 2). (As shown on the current guidelines grid [table 1 above], the presumptive sentences for these crimes would otherwise range from eighty-six to 158 months [first-degree] and from forty-eight to 108 months [second-degree], depending on the defendant's criminal history score.)

5. *The Commission's 1995 Modifications Proposal.* Despite this continued punitive trend, the legislature also encouraged the commission to exercise its independent judgment and expertise in crafting state sentencing policy. A 1994 statute directed the commission to "evaluate whether the current sentencing guidelines and related statutes are effective in furthering the goals of protecting the public safety and coordinating resources with sentencing policy." The commission was specifically asked to recommend options, including changes in guidelines rules, which would "ensure that state correctional resources are reserved for violent offenders" (1994 Minn. Laws, ch. 636, art. 2, sec. 67).

The commission initially chose to make a report on its proposals rather than formally adopt guidelines changes, because of the serious fiscal impact these proposals would have had on local governments (MSGC 1995b, p. 2). The principal proposals were to create a new severity level between levels VI and *VII, with all cells carrying presumptive executed prison terms, starting at thirty-six months for zero criminal history (the goal was to provide more flexibility in grading offenses and bridge the gap in presumptive durations [from twenty-one months stayed to forty-eight months executed, at zero criminal history] between severity levels VI and *VII); eliminate severity level I and shift some offenses up or down in ranking; limit the misdemeanor point to prior person and weapons offenses, and eligibility for the point to current person offenses; adjust presumptive durations at levels I–VI so that at each level they increase by the same number of months with each increment in criminal history (a similar change had been made in 1989, for levels *VII–*X); and reverse the order of severity levels on the grid so that the most serious offenses are at the top rather than at the bottom (to emphasize visually the resource and sanction-severity priority given to violent offenders; MSGC 1995b, p. 3).

Following discussion in legislative committees and further consideration by the commission, several of these proposals were adopted (MSGC 1996, pp. 11–12). Specifically, some property offenses were reduced in severity ranking, presumptive durations at levels I–VI were modified, and the order of severity levels on the grid was inverted.¹⁸ (As discussed more fully below, a new severity level VII was later created to handle felony drunk driving cases.)

6. *Plea Negotiation as Grounds for Departure.* A 1996 Minnesota Supreme Court decision, *State v. Givens*, prompted responses by both the commission and the legislature. In *Givens*, the court upheld an upward durational departure to which the defendant had agreed (in return for a stayed prison sentence, which was later revoked). The commission was concerned that this decision would encourage courts to depart whenever this was recommended (or not opposed) by the parties (MSGC 1997, pp. 10–14). “Plea agreement” had always been among the reasons cited for departure, occasionally the only reason, but the commission feared that this practice would become much more common. At best, such reasoning conceals the true reasons for departure, even if the latter are valid. At worst, such departures conceal invalid reasons, undercutting the goals of uniformity, proportionality, certainty of punishment, and prison population management. They also reduce the frequency of sentence appeals, thus limiting the ability of appellate courts to correct errors and clarify sentencing laws and guidelines.

Accordingly, the commission proposed to add “plea agreement” to the list of factors that may not be used as reasons for departure (MSGC 1997, p. 12) and further recommended that the legislature amend the guidelines-enabling statute (Minn. Stat., sec. 244.09, subd. 5) to include the following language: “Sentencing pursuant to the sentencing guidelines is not a right that accrues to a person convicted of a felony; it is a procedure based on state public policy to maintain uniformity, proportionality, rationality, and predictability in sentencing.” The legislature agreed to make the recommended statutory change, but it also directed the commission to study the matter and report on the advisability of allowing plea agreements as a reason for departure (and, in the interim, to not add “plea agreement” to the list of prohibited factors; 1997 Minn. Laws, ch. 96, secs. 1, 11). To deal with the problem of

¹⁸ However, the legislature delayed for one year (until Aug. 1, 1997) the effective date of these durational changes (1996 Minn. Laws, ch. 408, art. 3, sec. 39).

defendants like Mr. Givens, who agree to a stayed sentence and then seek to attack it years later when the stay is revoked, the legislature changed the rules on sentence appeals. A defendant receiving a downward dispositional departure pursuant to a plea agreement must appeal within ninety days, or before committing any act resulting in revocation of the stay, whichever occurs first (1997 Minn. Laws, ch. 96, sec. 2).

After conducting public hearings, holding meetings with practitioners, and considering these matters further, the commission decided not to add "plea agreement" to the list of prohibited factors (MSGC 1998, pp. 13-19). Judges were opposed to the change, prosecutors opposed limits on upward departures, and all practitioners seemed to agree that plea agreements and departures had become more common because of both caseload pressures and increases in the severity of presumptive sentences. The commission proposed instead to add language to the guidelines commentary, recognizing that plea agreements are valid and necessary but noting that if no other reasons for departure are cited, the commission cannot properly understand sentencing decisions and make sound policy decisions (MSGC 2003*b*, Commentary II.D.04). The proposed commentary concluded that: "When a plea agreement is made that involves a departure from the presumptive sentence, the court should cite the reasons that underlie the plea agreement or explain the reasons the negotiation was accepted." Because the legislature had vetoed the commission's earlier proposal to forbid "plea agreement" as a reason for departure, the commission requested the legislature specifically to approve the amended commentary, which it did (1998 Minn. Laws, ch. 367, art. 2, sec. 28). In response to these legislative and commission decisions, the state supreme court subsequently overruled *Givens* in *State v. Misquadace* and held that a plea agreement, standing alone, is not a sufficient basis for departure.

In 2001, the legislature enacted felony penalties for repeat driving while intoxicated (fourth impaired driving incident within ten years; 2001 Minn. Laws, 1st sp. sess., ch. 9, art. 19, secs. 4, 8-10). Violators are subject to a prison term of at least three and no more than seven years, and courts are allowed to stay execution but not imposition of the prison terms. Other required penalties included chemical dependency treatment (in prison or out), a five-year required conditional release period following an executed prison term, and required jail time or intensive supervision if the prison term is stayed. The effective date was delayed until August 2002.

The commission initially voted to give all such offenders presumptive prison terms, on the assumption that this was the legislative intent (MSGC 2002, p. 3). But the projected costs of this approach were quite high, and, upon consultation with the legislature, it was determined that offenders with fewer than three criminal history points and no prior felony driving while impaired (DWI) convictions should receive presumptive stayed prison terms (MSGC 2003c, p. 5). Felony DWI cases were placed in a new severity level, VII, with presumptive sentence durations ranging from thirty-six to seventy-two months, depending on criminal history (former severity levels *VII-*X then became new levels VIII–XI).

D. Major Proposals Not (Yet) Adopted or Fully Implemented

It is important to consider changes that were not adopted, as well as those that were. One of the most important goals of the guidelines is to ensure that sentencing policy is coordinated with correctional resources. The commission has used its prison population projections not only in shaping initial and amended guidelines provisions but also to inform the legislature of the fiscal impact of proposed new or amended criminal laws. Although many severe penalties have been added since 1980, others were rejected or scaled back when the legislature realized the cost. This was true even in periods of the most intense law-and-order sentiment described above—in 1989, 1992, and 1993 (Dailey 1993a, p. 145).

The commission has considered but rejected a number of major changes in the guidelines. On a number of occasions, including several times at the direction of the legislature, the commission has considered whether the guidelines should regulate the conditions of nonprison sentences. In each case, however, the commission decided not to develop such guidelines (MSGC 1988, pp. 10–11; 1989, pp. 19–36; see also 1991b). In 2000, at the request of a member of the House of Representatives, a subcommittee of the commission began once again to consider issues surrounding the use of nonimprisonment sanctions (MSGC 2001, p. 14). This subcommittee continued to meet in 2002 (MSGC 2003c, p. 2), but no formal report or proposal was adopted. The main reasons for the commission's decisions not to implement such guidelines were lack of local resources to implement such guidelines consistently, lack of consensus as to the punishment theory or theories underlying intermediate sanctions, a reluctance to make the guidelines more complex, and strong resistance among practitioners to nonimprisonment guidelines (MSGC 1989, pp. 34–35). There is also

considerable doubt whether lower limits on the severity of intermediate sanctions would be enforceable, and, to the extent that they were, this would entail additional cost not only for those sanctions but also for the higher prison rate enforcement would bring (Frase 1997, pp. 424–25).

Several other major changes were considered but not adopted. Numerous proposed changes in severity rankings or criminal history scoring were ultimately rejected (see, e.g., previous discussion of the five proposals contained in MSGC [1995*b*]). Changes in disposition policy were also considered and then dropped (see, e.g., MSGC [1988, pp. 8–9, 25–27] proposing to reduce imprisonment of crime-spree offenders by requiring a minimum number of prior “interventions” before an executed prison term could be imposed; instead, this factor was added to the list of factors permitting downward departure; see MSGC 2003*b*, sec. II.D.2.a[4]). In the early 1990s, the commission developed but did not formally adopt a set of general principles for ranking the severity of new and amended crimes (MSGC 1991*a*, pp. 10–13). At the legislature’s request, the commission developed a model for the use of day fines (MSGC 1993, pp. 14–33), but the model was never fully implemented. As originally conceived, each judicial district was to adopt the commission’s model or its own day-fine system (1990 Minn. Laws, ch. 569, art. 2, sec. 102). A revised legislative directive expanded the scope of the model to include misdemeanors and gross misdemeanors but only required implementation in one pilot project (1991 Minn. Laws, ch. 292, art. 8, sec. 6). No district has yet been willing to conduct this experiment.

V. Sentencing Practices under the Guidelines

One of the most important features of a commission-based sentencing guidelines system is the ability to base sentencing policy decisions on accurate data about past and current sentencing practices, and about projected future resource impacts. The commission took this task very seriously. Pursuant to the statutory directive to take existing sentencing and releasing practices into substantial consideration, the commission began by collecting and analyzing preguidelines decisions by judges and the corrections board. The enabling statute also directed the commission to study the resource impact of the guidelines; to conduct ongoing research regarding sentencing guidelines, the use of imprisonment, and other matters relating to the improvement of the criminal justice system; and to make appropriate recommendations to the legislature (Minn. Stat., sec. 244.09, subds. 6–7).

To carry out these directives, the commission has routinely collected a substantial amount of data on all felony sentences imposed under the guidelines and has collected additional, even more detailed, data for selected samples of cases.¹⁹ The commission has published many reports analyzing its data; it has also made its data sets available to academic researchers, who have published numerous papers in legal and criminology journals. As a result, sentencing practices over two decades under the guidelines are very well documented.

The following summary shows how sentencing practices were shaped initially, and over time, by the legislative and commission policy choices and appellate case law described earlier, as well as the sometimes differing values and traditions of judges, attorneys, and other practitioners. These data provide a basis to evaluate the challenges, successes, failures, and unintended consequences of sentencing reform in Minnesota.

A. Changes in Preguidelines Practices: 1981–85 versus 1978 Baseline Data

What changes in existing sentencing practices and policies did the Minnesota guidelines bring about? Did judges generally comply with

¹⁹ The commission compiled two preguidelines data sets based on 1978 cases, one examining the use of executed prison terms, the other dealing with the duration of such terms (time served prior to first release on parole; MSGC 1979, 1984, p. 20). The commission then compiled postguidelines "evaluation" data sets for all felons sentenced in each year. At first these data sets covered "years" running from November through October (and designated by the later of the two years); starting in 1988, the annual data sets cover a calendar year. The commission has also compiled more detailed data on the use of jail, fines, and other conditions of nonprison sentences, and on the sentencing of weapons, drug, and other offender groups. Finally, the commission compiled four "in depth" data sets for the years 1978, 1981, 1982, and 1984, containing detailed information on the "real" (vs. charged and convicted) offenses, charging and plea bargaining, and offender demographics. These data sets only included defendants sentenced in eight counties, containing about 60 percent of the state's population (MSGC 1984, pp. 19–20). In addition to the reports cited above, the commission published a comprehensive evaluation of the first three years of sentencing under the guidelines (MSGC 1984). The commission has also published selected statistics from the annual evaluation data sets. To minimize the number of source citations, in the remainder of this essay statistical results are generally cited by year or data set only, rather than by publication, except for the most recent (2001) annual summary that was available when this essay was written (MSGC 2003d). Much of this information can be found in the annual data summaries for the years in question; these data summaries are only specifically cited for information that was not derived from the corresponding annual data set (e.g., crime and arrest data). When data not published by the commission are cited, it is based on my analysis of the commission's data sets using SPSS (Statistical Package for the Social Sciences) software (SPSS For Windows, version 10). Recent annual data summaries, including the 2002 summary (MSGC 2004c), which was published after this essay was written, are available on the commission's Web site (<http://www.msgc.state.mn.us>). Except as noted in text, the data for 2002 are fairly similar to the 2001 data.

them, thus achieving, at least initially, legislative and commission reform goals? Sentencing reforms take some period of time to stabilize (e.g., the 15 percent prison rate for 1981 was much lower than in any year since). Thus, an assessment of the guidelines' initial impact must be based on several years of postguidelines practice. For several reasons, 1985 provides an appropriate end point for the initial post-guidelines period: the most important appellate case law dates from this period; more detailed charge and real-offense data, and many inside and outside evaluations, are available for these years; and sentencing practices appear to have changed less in the second half of the 1980s than in the first.²⁰

1. *Overall Compliance Rates.* The commission's principal measures of compliance have been the rates of departure from presumptive prison commitment ("disposition") and prison duration rules. Dispositional departures can be either "upward" or "downward" (sometimes referred to as "aggravated" or "mitigated" departures), depending on whether the presumptive disposition was a stayed or an executed prison sentence. Durational departures can also be either upward or downward and are usually reported separately for executed prison terms and all prison terms, including both executed and stayed sentences. Since most stays are never revoked, I focus on executed prison durational departure.

As is shown in figures 1 and 2, dispositional and executed prison durational departure rates fell dramatically in 1981, the first year of the guidelines.²¹ After 1981, the rates for upward and downward durational departures, and for upward dispositional departures, remained fairly stable for several years. Downward dispositional departure rates fell slightly in 1982 but rose steadily from 1982 (19 percent) to 1985 (32 percent).

²⁰ This section also reports some data for periods after 1985, where sentencing practices remained unchanged in those periods.

²¹ Of course, since there were no presumptive sentences to "depart" from in the preguidelines period, "departure rates" and other "disparity" measures for that year are only meaningful as a way of comparing pre- and postguidelines sentences relative to the offense groupings and other norms embodied in the guidelines. Relative to preguidelines sentencing norms (giving greater emphasis to rehabilitation and other nondesert values), it is quite possible that "departure rates" increased under the guidelines. It should also be noted that the preguidelines durational departure rate shown in fig. 2 (38 percent) is not directly comparable with the postguidelines rates. The former figure represents the estimated total departure rate under the parole guidelines matrix in 1979 (MSGC 1984, p. 43); the commission did not collect data on preguidelines prison durations imposed by courts because they had little impact on actual prison time served.

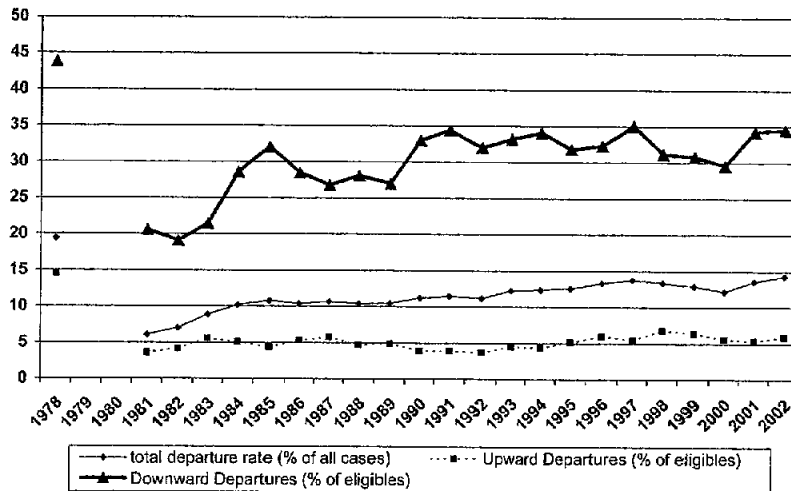


FIG. 1.—Minnesota sentencing guidelines: dispositional departure rates by year. Source: MSGC monitoring data.

It is important to note that the downward and upward dispositional departure rates shown in figure 1 are based on the defendants eligible for each type of departure—downward departures as a percentage of the number of cases with presumptive executed prison terms, and upward departures as a percent of cases with presumptive stayed prison

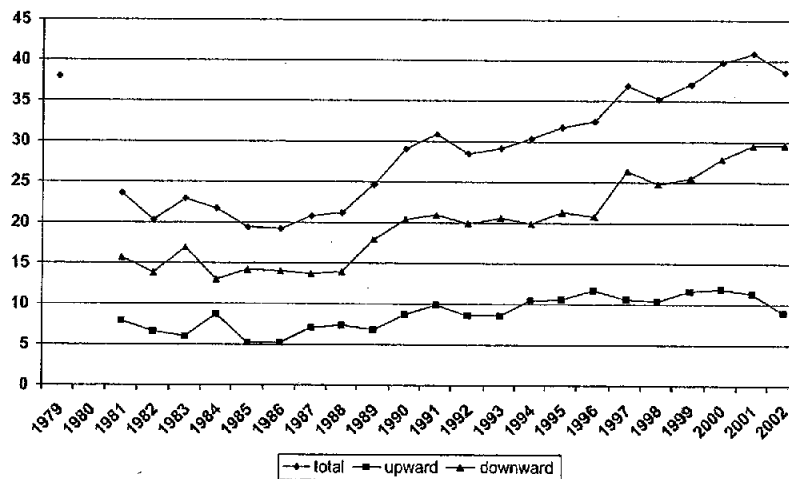


FIG. 2.—Minnesota sentencing guidelines: durational departure rates by year (executed prison sentences only). Source: MSGC monitoring data.

terms. In its early reports (e.g., MSGC 1984), the commission generally reported rates for these two types of departure as a percent of the total cases sentenced in each year. This method produces much lower rates, especially for downward departures, and shows even greater increases in the latter during the early postimplementation period (the 1981 and 1985 percent-of-all-cases downward departure rates are 3.1 and 7.4 percent, respectively; as a percent of eligibles, the 1981 and 1985 rates are 21 and 32 percent, respectively; MSGC 2003e, p. 25). The lower percent-of-all-cases measures give a distorted view of downward dispositional departure rates and trends because they do not account for the very different number of cases eligible for each type of departure, and for changes in these proportions over time. The number of cases with presumptive executed prison terms (downward-departure eligibles) is much smaller than the number with presumptive stayed prison terms (upward-departure eligibles), but the proportion of the former increased substantially from 1981 to 1985 (from 15 percent to 23 percent, respectively, of all cases).

This statistical point also has implications for comparisons of departure rates between certain subgroups with substantially different proportions of presumptive prison terms (e.g., race and gender groups, judicial districts, and offense types). For present purposes, the important point is that downward dispositional departures were quite common even in the first year of the guidelines but did not increase as much over time as the commission's early published figures indicated. Resistance by judges and attorneys to one of the commission's most significant "prescriptive" choices—to imprison more "person" offenders with low criminal histories—was immediate. Using adjusted rates also helps us to see more clearly how consistently downward departure rates (dispositional as well as durational) have outweighed upward departure rates. This pattern corroborates other evidence suggesting that plea bargaining concessions remained widespread under the guidelines.

A more fundamental problem with measuring guidelines compliance by means of overall durational and dispositional departure rates is that these measures take no account of changes in case mix over time. Crime patterns and prosecution policies sometimes change dramatically in just a few years. There were three significant changes between 1978 and 1983 (MSGC 1984, pp. 57, 78, 80–81).

More defendants requested that their presumptive stayed prison terms be executed (which must be granted if the proposed stay

conditions are very onerous; see *State v. Randolph*) from 1981 to 1983. This change explains all of the increase in upward dispositional departures between 1981 and 1983 (Frase 1991b, p. 738).

The number of child sex abuse cases also increased dramatically between 1981 and 1983: the total number tripled, and first-degree offenses quadrupled. These cases had consistently high rates of downward dispositional departure in the early 1980s, and their rapid increase explains some of the rise in overall departure rates during that period.

Rates of charge reduction to lower severity levels for high-severity cases with low criminal history scores were much higher in 1981 through 1983 than they were in 1978. This major increase in "vertical" charge bargaining between pre- and postguidelines periods suggests that comparisons of downward departure rates based on conviction offense may substantially understate the mitigation rate relative to the "real" offense—as measured by the more serious charges that were initially filed or could have been filed. Conviction-offense measures thus tend to overstate the initial "success" of the guidelines. Clearly, some vertical charge reductions and lenient initial charging decisions are de facto mitigating dispositional or durational departures. The same is sometimes also true of "horizontal" reductions in the number of crimes or separate counts filed and retained through conviction.²²

To take into account the effects of changes in horizontal and vertical charging and plea bargaining practices, what is needed is a measure of the downward dispositional departure rate based on the defendant's "real-offense" and "real" criminal history score—that is, the maximum provable severity and number of charges, whether or not such charges were filed or retained. As part of its initial evaluations, the commission constructed a real-offense variable (called the "alleged offense") based on its reading of corrections and court files (e.g., presentence investigation reports, the complaint or indictment, etc.; MSGC 1984, pp. 19–20). Since evidentiary problems often do not appear in such files, this measure tends to overstate "real" offense severity. Another limitation is that alleged-offense data for all crimes is only available through 1984, and only for eight of the larger counties in the state (representing about 60 percent of the state felony caseload). Finally, it must be noted that there is no corresponding measure of "real" (versus conviction-based) criminal history, so we cannot precisely compute the "real cell"

²² Under the concurrent sentencing rule of *State v. Hernandez*, having fewer counts at conviction produces a lower present and future criminal history score.

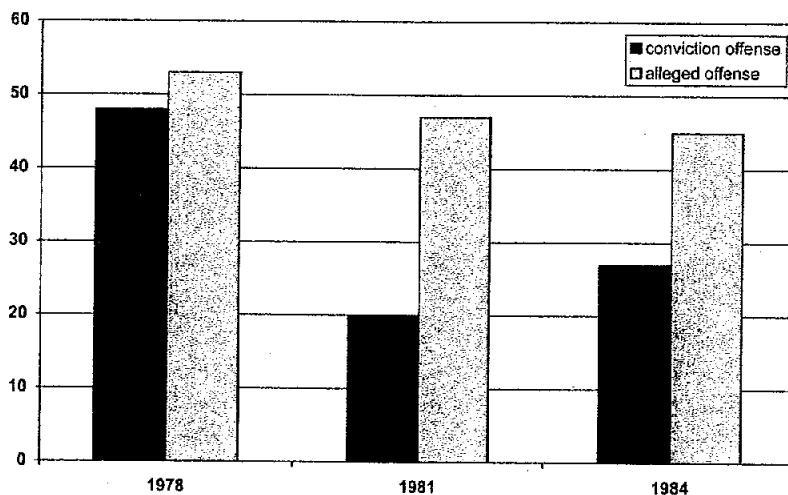


FIG. 3.—Minnesota sentencing guidelines: downward dispositional departure rates by year, based on conviction offense and alleged offense (eight-county, in-depth samples). Source: Frase 1993a, p. 302.

into which each defendant falls; using conviction-based criminal history tends to understate the extent of the defendant's "real" criminal history.

As is shown in figure 3, downward dispositional departure rates based on the alleged offense are much higher than conviction-offense-based rates, especially in the postguidelines years.²³ While conviction-offense departure rates fell dramatically from 1978 to 1981 (from 48 to 20 percent), estimated real-offense departure rates only fell from 53 to 47 percent during that time. Thus, much of the apparent improvement in conviction-offense dispositional departure rates in 1981 seems to have been due to changes in charging or plea bargaining—by 1981, many more of the cases eligible for presumptive prison-commit sentences (based on the "real" offense) were being convicted of less serious charges, carrying no presumptive prison term.²⁴ Between 1981 and 1984, conviction-offense downward dispositional departure rates went back up (from 20 to 27 percent), while alleged-offense rates fell a bit further (from 47 to 45 percent).

²³ The operational definition of alleged-offense presumptive prison cases (the denominator of the alleged-offense downward departure rates) is described in Frase (1993a, p. 301, n. 70).

²⁴ In 1978, 77 percent of presumptive prison-commit cases based on alleged offense were also presumptive commits based on the conviction offense; by 1981, this proportion had fallen to 63 percent (eight-county, in-depth data for both years). These results are consistent with the commission's finding that charge reduction increased under the guidelines.

These estimated real-offense departure rates are undoubtedly exaggerated by the fact that many "alleged" offenses were not legally provable. Thus, the *real* "real-offense" downward departure rates must lie somewhere in between the conviction-offense and alleged-offense rates shown in figure 3. It is also possible that the evidentiary strength of charges changed over time (although this seems unlikely to have changed dramatically). The most important point here is that future guidelines analysts and researchers must seek to develop and regularly to collect real-offense data; without such data, there is no way to assess the effects of de facto downward departures achieved through charging leniency. And without combined measures of de jure and de facto departures, one cannot properly interpret conviction offense departure rates, nor can one accurately assess either the initial success of guidelines or their evolution over time.²⁵

2. *Racial, Gender, and Socioeconomic Disparities.* The commission's in-depth studies, as well as early outside evaluations of the guidelines, concluded that race, gender, and class biases had largely been eliminated as direct causes of sentencing disparity, although they continued to affect sentences indirectly (e.g., minority offenders tend to have higher criminal history scores; MSGC 1984, pp. 66-67; Miethe and Moore 1985, pp. 352-55 [table 2], 358). Most of these inside and outside evaluations were based on conviction-offense data. Unfortunately, the commission's limited real-offense data are too crude to permit reliable analysis of the often subtle and complex interactions of illegitimate factors such as race, gender, and employment with formal sentencing factors such as offense and prior record. Thus, it remains possible that these illegitimate factors produce significant disparities by means of differences in charging and/or plea bargaining decisions.

3. *Charging Practices.* The commission's three-year evaluation (MSGC 1984, pp. 71-86) reported data on changes in charging and negotiation practices in the eight counties for which in-depth data were gathered. As would be expected in a conviction-offense system that regulates sentences but not prosecutorial discretion, the proportion of cases involving charge bargaining increased, while the overall rate of sentence bargaining decreased.²⁶ Increases in charge reduction

²⁵ Plea bargaining can produce a conviction-offense "upward" departure, which, in real-offense terms, is actually a downward departure.

²⁶ In contrast, Miethe (1987, p. 165) concluded that "charging and plea bargaining practices remained fairly stable across pre- and postguidelines periods." Miethe's results are questioned in Tonry (1988, p. 312, n. 7).

("vertical" charging) were especially great for cases initially charged at severity levels *VII-*X, with criminal histories of zero or one point. The changes were greatest for child sex abuse cases (most of which were committed by white offenders); charge reduction rates increased from 50 percent of the cases in 1978 to 80 percent in 1981. However, rates of charge reduction in child sex cases declined in 1982 and 1983, because of statutory and case law changes in 1981 that permitted mitigated dispositional departures (based on "the best interests of the complainant and the family unit," and/or defendant "amenability to probation" or "unamenability to prison") without a charge reduction (MSGC 1984, p. 80).

There were also significant changes in the number of charges filed and retained to conviction ("horizontal" charging). The proportion of offenders with higher criminal history scores increased, both as a result of the *Hernandez* decision (allowing multiple current conviction charges to immediately increase criminal history under concurrent sentencing) and as a result of prosecutors "targeting to the disposition line"—negotiating for enough conviction charges to give the offender a presumptive prison sentence on his or her next offense (MSGC 1984, pp. 82–84). This practice was especially common for nonwhite offenders in one large county (Hennepin).

Although the overall proportion of sentence bargains decreased, that was only true for some types of bargains. Negotiations as to prison disposition increased substantially (from 14 percent of eligible cases in 1978 to 25 percent under the guidelines), and so did negotiations as to the duration of jail terms (from 5 percent of probation cases to 26 percent); only negotiations as to prison duration fell (from 30 to 17 percent). There was also considerable geographic variation—sentence bargains of one or more types remained very common in some of the eight counties studied and disappeared in others.

4. *Plea Bargaining Disparities.* Evaluations by outside researchers have revealed the continued existence of plea-trial disparities (Miethe and Moore 1985; Frase 1993a). Controlling for offense severity, criminal history, and numerous other legal and extralegal factors, defendants found guilty at trial are significantly more likely to receive a prison sentence. The extent to which the method of disposition causes this difference is unclear; defendants who go to trial have higher offense severity and criminal history scores, and it is quite possible that trial cases are more aggravated even within categories of conviction offense, prior record, and the other measured explanatory variables.

Even if more variables and subcategories were available, one could never be absolutely certain that all appropriate sentencing factors had been taken into account. As is often the case in social science research, we must rely on the corroboration provided by a variety of less-than-ideal measures—what Hans Zeisel called “triangulation of proof” (1968, pp. 190–99). In the present case, these various measures all point in the same direction. To begin with, the overwhelming majority of convictions involve guilty pleas. The trial rate was 4.9 percent in 1978 and varied between 4 and 4.9 percent in 1981–85. (In 2001, the trial rate was 4 percent.) Moreover, most guilty pleas are negotiated (MSGC 1984, p. 72, table 27), usually in return for some form of leniency. Finally, there is a remarkably consistent overall pattern of leniency in the application of guidelines imprisonment rules. It is possible, of course, that presumptive sentences are consistently too severe or that mitigating circumstances are inherently much more common than aggravating factors. In light of the high rates of pleas and plea negotiation, however, it seems much more likely that this pattern of leniency reflects tacit or explicit sentence bargaining that causes reduced sentence severity for defendants who plead guilty.

Consider the following: as shown in figure 2, downward durational departures have always been twice as common as upward departures. Downward dispositional departures have generally been about six times more frequent than upward departures, as a percentage of offenders eligible for each type of departure (see fig. 1). Upward dispositional departure rates would be even lower if defendant requests for prison and prison terms concurrent with other charges were excluded (MSGC 2003*d*, p. 23).²⁷

Furthermore, departure statistics based on the conviction offense tend to understate the number and proportion of downward departures, while overstating upward departures. Downward departure rates do not include de facto departures achieved through nonfiling, reduction, or dismissal of provable charges. Indeed, charging leniency of this kind is sometimes coupled with an upward dispositional or durational departure on the lower charge of conviction. Such departures produce

²⁷ For a number of years, upward durational departures of stayed sentences were agreed to by defendants in return for charging leniency and/or a downward dispositional departure; see, e.g., *State v. Givens*, 544 N.W.2d 774 (Minn. 1996). This practice was disapproved by statute and guidelines commentary and was later outlawed by the state supreme court in *State v. Misquidace*, 644 N.W.2d 65, 71 (Minn. 2002).

a prison term that is still shorter than the defendant would have received on the provable higher charge—an upward departure that, in reality, represents a downward departure! An early guidelines case illustrates these practices. In *State v. Garcia* (302 N.W.2d 643 [Minn. 1981]), the court upheld upward dispositional and durational departures in a case involving a significant charge reduction (from a seemingly provable first-degree rape [severity level *VIII] to kidnapping [level VI]).

In addition, the commission's independent assessment of guidelines departures in 1981 and 1982 consistently found that downward departures were less often justifiable than upward ones (MSGC 1984, pp. 54, 56). And, the commission's assessment of 1981 and 1982 cases receiving the presumptive sentence consistently found that most failures to make a justifiable departure were failures to aggravate, not failures to mitigate (MSGC 1984, pp. 54, 56).

Despite these high rates of mitigating departures and failures to aggravate, prosecution appeal rates have remained low. Less than 1 percent of all sentences had been appealed by either side as of July 1984. In the same period, about 14 percent of sentences included a departure (MSGC 1984, p. 110), and an unknown additional proportion represented arguably unjustifiable failures to depart. (As of 2001, the total sentence-appeal rate was 1–2 percent, despite a total departure rate of 26 percent; MSGC 2003*d*, p. 23.)

Overall prison rates for cases tried are much higher than for cases pled guilty, and neither rate has changed much since 1978. Even when trial and plea cases are analyzed within estimated “real-offense” grid cells, to take account of charging variations, sentence bargaining, and formal departures, the results indicate that the disparity in prison rates between trial and guilty plea cases did not decline with the advent of the guidelines (Frase 1993*a*, p. 318, n. 93).

Thus, it is very likely that plea-trial disparities continued to exist in the early postguidelines years, and they probably still exist today. The continued existence of widespread charging and plea bargaining concessions also suggests that lower limits on sanction severity are much less likely to be enforced than upper limits—a finding consistent with Morris's theory of limiting retributivism, but inconsistent with any more precise, “defining” retributive model (see, generally, Frase 1997, 2004).

5. *Other Disparities.* One of the most important types of disparity—between judges, especially those hearing cases in the same judicial district—has not been analyzed by the commission, at least in its

published reports.²⁸ Nor can such disparities be assessed using the commission's public data sets, which do not contain judge identifier codes. The judge identification data exist, but apparently both the commission and outside researchers have felt that these data might be misused if published and could seriously weaken judicial support for the guidelines.

Considerable regional variation exists in the sentences imposed in different judicial districts. In the first three years under the guidelines, the ranges for the total executed prison durational departure rate (upward plus downward) across the ten judicial districts were 10–42 percent, 12–28 percent, and 16–30 percent (MSGC 1984, tables 9, 13, 15). (Data on preguidelines durational departure rates are not available.) As for dispositional departures, the interdistrict variation in departure rates in 1981–83 was somewhat less than in 1978 but still quite substantial: by 1983, upward dispositional departure rates ranged from a low of 1 percent to a high of 10 percent; downward departure rates by district ranged from a low of 9 percent to a high of 26 percent (in 1978, these ranges were 8–19 percent and 16–64 percent, respectively).²⁹

B. Evolution of Practices, 1981–2003

How have sentencing practices and outcomes changed in the twenty-three years since the guidelines became effective? The following summary tells the story through 2001 (the most recent year for which complete sentencing data were available when this essay was written) and provides selected data for 2002 and 2003.

1. *Changes in Sentenced Felony Caseloads.* The number of sentenced felons has increased substantially, and there have also been major changes in the relative proportions of different offense and offender groups. These developments reflect changes in crime patterns, state population demographics, law enforcement priorities, and prosecutorial charging decisions. It is necessary to take these caseload changes

²⁸ A study of federal sentencing (Hofer, Blackwell, and Ruback 1999) concluded that the federal guidelines have significantly reduced overall interjudge disparity.

²⁹ Published data on dispositional departure rates by district show very different patterns (much lower downward departure rates, with a different rank order by district; see MSGC 1984, tables 2, 6, and 8). However, these rates are computed as a percentage of all cases sentenced, rather than (as in the text here) as a percentage of cases eligible for each type of departure. Percent-of-all-cases figures are distorted by the major variations, across districts, in the proportion of cases with presumptive commit sentences. District variation remains significant in multiple regression analyses (Frase 1993a, tables 2, 4, 8).

into account when interpreting trends in guidelines compliance and in the use of prison and other sentencing alternatives.

The total number of felons sentenced per year increased by 96 percent between 1981 and 2001, reflecting increased crime and arrest rates in this period—adult arrests increased by 127 percent from 1980 to 2000 (MSGC 2003*d*, p. 5). Almost half of the increase in the sentenced caseload occurred between 1986 and 1990, fueled by a near tripling in the number of drug cases, combined with a 63 percent increase in crimes against the person (MSGC 2003*d*, p. 11). Over the entire twenty-year period, the sentenced caseload increases by offense type were as follows: person crimes went up 152 percent between 1981 and 1994, then fell back slightly, but were still up by 133 percent in 2001. Drug offenses were 221 percent higher in 2001. Property offenses peaked at 43 percent higher in 1993 and ended up 30 percent higher in 2001. For all other offenses, the number sentenced in 2001 increased by 878 percent, but from a very low base—these offenders constituted only 2 percent of the total in 1981, rising to 10 percent in 2001.³⁰ Of these four offense types, property offenders remained the largest single group but accounted for a steadily lower percentage of total cases, declining from a high of 66 percent in 1983 to a low of 41 percent in 2001. In the latter year, person offenses and drug offenses each accounted for about one-quarter of all cases, compared with 21 percent and 15 percent, respectively, in 1981.

Preliminary data for 2002 reveal some dramatic changes. Sentenced felons increased by 20 percent (the greatest one-year increase under the guidelines), and the number of drug offenders increased by 32 percent (MSGC 2004*b*, p. 14). Among drug offenses, the increases were greatest for first-degree crimes (up 62 percent) and methamphetamine cases (up 49 percent; MSGC 2004*b*, p. 15). The number sentenced for nondrug offenses also increased (person offenses up 11 percent, property crimes up 18 percent, and other crimes up 25 percent; MSGC 2003*a*, p. 3). As a result, in 2002, each of the four offense types had the highest number of cases ever recorded. Sentenced caseload changes from 1981 through 2002 were as follows: person offenses up 157 percent, drug crimes up 324 percent, property crimes up 53 percent, other crimes up 1,126 percent, and total felons sentenced up 136 percent.

³⁰ In 2001, one-quarter of these were weapons offenses, and half of them were fleeing a police officer in a motor vehicle.

There have also been important demographic shifts since the early 1980s. The proportion of female offenders rose steadily, from 11 percent in 1981 to 18 percent in 2001, and the proportion of nonwhites increased from 18 to 40 percent of sentenced offenders (MSGC 2003*d*, pp. 6–7). The greatest increases were for African Americans and Hispanics. The former rose from 11 percent of offenders in 1981 to 29 percent in 1997 (declining to 27 percent by 2001). The proportion of Hispanics increased from 2 percent in 1981 to 6 percent in 1996 (declining to 5 percent in 2001). Asian offenders increased from 0.2 in 1981 to 2 percent in 2001. The proportion of American Indian offenders remained constant at 5–6 percent. These racial shifts reflected significant changes in the composition of the state's population.

In terms of the distribution of cases on the guidelines grid, there were important increases in the relative proportions of offenders at higher offense and criminal history levels.³¹ From 1981 through 1989, the proportion of offenders whose most serious conviction offenses were at severity levels *VII–*X (all of which have presumptive prison-commit sentences, regardless of criminal history) was either 7 or 8 percent; by 2001, this had risen to 11 percent (MSGC 2003*d*, p. 9). Given the major increases in presumptive prison durations at levels *VII–*X, which became effective in late 1989, as well as the continuing increase in caseloads, one might have expected the opposite—that is, a decline in high-severity convictions as prosecutors, on their own or in response to caseload pressures and offender resistance, reduced initial or final (plea-bargained) charge levels. It is possible, of course, that such prosecutorial adjustments did occur but were masked by increases in the average seriousness of crimes being prosecuted. In the absence of real-offense data for these years, we cannot separate these different effects.

Even greater increases over time have occurred in the distribution of offender criminal history scores. These major changes are difficult to attribute to offender behavior. It seems more likely that prosecutors have been filing and retaining more counts in order to build offenders' history scores and thus increase current and future sentencing severity. The proportion of offenders with zero criminal history fell steadily, from 62 percent in 1981 to 44 percent in 2001 (MSGC 2003*d*, p. 9). The group with scores of from one to three rose steadily, from 30

³¹ The following data are for 2001, when the guidelines grid still contained ten severity levels; a new severity level, VII, shown in table 1 above, was added in August 2002. Readers are reminded that the top four pre-2002 severity levels are referred to as *VII, *VIII, *IX, and *X.

percent in 1981 to 39 percent in 2001. The proportion of offenders with four or more points also increased steadily in the 1980s—from 8 percent in 1981 to 16 percent in 1989. In the next five years, this proportion fell back slightly, generally remaining at 14 or 15 percent, probably as a result of the criminal history weighting system, which went into effect in late 1989 (the half-point weighting given to high-volume, low-severity felony convictions apparently had more impact than the one-and-a-half- and two-point weightings given to higher-severity, lower-volume convictions). But in later years the proportion of offenders with four or more points went up again and remained at about 17 percent from 1995 to 2001.

As a result of these increases in average offense severity and criminal history scores, combined with more and more statutes prescribing mandatory or presumptive prison terms, the proportion of offenders with presumptive prison-commit sentences rose from 15 percent in 1981 to 29 percent in 2001 (MSGC 2003d, p. 25). However, as a result of increasing rates of downward dispositional departure, the proportion of offenders sentenced to prison has increased much more slowly and has never exceeded 24 percent in any year.

Perhaps because of the major 1989 increases in presumptive prison durations for high-severity crimes, combined with the higher proportions of offenders eligible for these severe presumptive sentences, prosecutors have made sparing use of the extended-term sentencing laws enacted in 1989 and later years. The career offender statute was the most heavily used of these, being cited in twenty-eight executed prison cases in 2001 (out of a total of 2,450 prison sentences); the patterned sex offender law was invoked only six times, and the general dangerous offender statute only seven times.

2. *Compliance with Guidelines Rules (Departure Rates).* Although the great majority of offenders continue to receive the recommended guidelines sentence, rates of departure have risen steadily over time. In 2002, 27 percent of offenders received a dispositional or durational departure (MSGC 2004c, p. 28). Downward departures (19 percent) were much more common than upward departures (6 percent) and mixed departures (2 percent; the latter involve an upward departure as to disposition and a downward departure as to duration, or vice versa). As was noted previously, these figures actually understate the frequency of downward departures. When provable additional counts or more serious charges are dismissed in plea bargaining, giving the offender a lower criminal history or conviction offense severity level, the result is a

de facto downward durational or dispositional departure. As was also noted, defendants in some of these cases agree to accept an upward dispositional or durational departure that is really a downward departure—because the enhanced penalty is still less than the offender would have faced without a reduction in the number or severity of charges. The precise nature and number of these hidden departures cannot be assessed because real-offense data were not collected after the early 1980s. The remainder of this section examines trends in formal (conviction-offense) departure rates.

a) *Dispositional Departures.* As is shown by the middle line in figure 1, total dispositional departure rates (downward plus upward departures, as a percent of all cases sentenced) increased rapidly in the first half of the 1980s, stabilized through 1989, and then rose again through 2002 (in that year, the rate was 14.3 percent; the 1981 rate was 6.1 percent). The further increases in the latter period seem primarily to reflect the increase in rates of downward departure.

The post-1989 changes can be seen more clearly when upward and downward departures are shown separately and computed as a percent of cases eligible for each type of departure—these are the adjusted (“percent of eligibles”) rates, shown by the top and bottom lines in figure 1. Downward dispositional departures varied within a narrow range (19–22 percent) in the early 1980s but were much higher later in that decade, reaching 32 percent in 1985 and falling to 27 percent by 1989. After 1989, these rates again moved sharply higher, rising to 34 percent in 1991 and remaining at 32 percent or higher in seven of the next eleven years. This further escalation in downward departures, coinciding with the major increases in presumptive sentence durations that became effective in late 1989, appears to reflect an effort by judges and other practitioners to shelter many defendants from the new, harsher penalties.

Upward dispositional departure rates (the bottom line in fig. 1) have remained fairly constant since 1981, hovering around 5 percent of presumptive stay cases. The rate of upward departures fell in 1990 and 1991, which might be expected—the increased durations enacted in 1989 made courts less willing to impose executed prison sentences. But the rate of upward dispositional departures rose again after 1992 and remained at or above 5 percent from 1995 through 2002. At least some of this increase may be explained by the fact that some “upward” departures are really de facto downward departures resulting from the dismissal of provable, more serious charges.

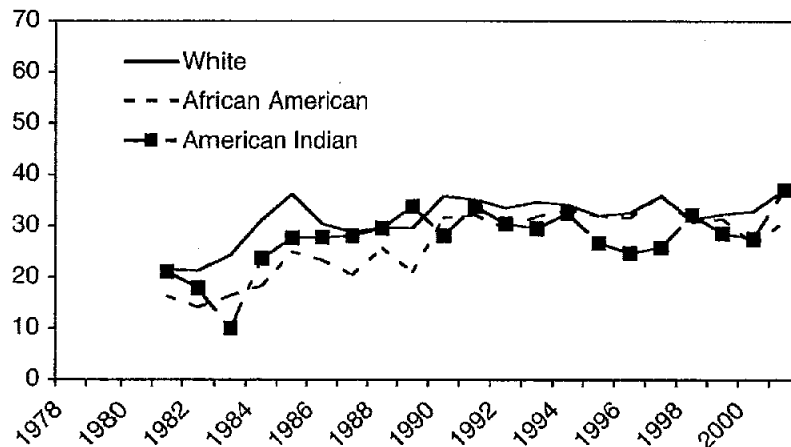


FIG. 4.—Minnesota sentencing guidelines: downward dispositional departure rates by race, 1978, 1981–2002. Source: MSGC monitoring data.

(1) *Variations by district, race, sex, offense, and grid location.* Adjusted dispositional departure rates vary considerably by region. In 2001, the ten judicial districts had adjusted downward departure rates ranging from 19 to 44 percent (MSGC 2003d, p. 26). (In most years the variation across districts is somewhat less; e.g., in 2000 it ranged from 23 to 35 percent.) Adjusted upward dispositional departure rates also vary across districts, but to a lesser degree (in 2001, the range for the ten districts was 3.2–7.7 percent).

There are very substantial variations by gender and race in adjusted dispositional departure rates.³² Females have consistently lower upward departure rates (e.g., 3.2 percent in 2001 vs. 6 percent for males) and consistently much higher downward departure rates (e.g., 56 percent in 2001 vs. 32 percent for males; MSGC 2003d, p. 27). Racial differences are more variable from year to year. Blacks and Native Americans tend to have higher upward dispositional departure rates than whites in most years. As is shown in figure 4, adjusted downward departure rates have been quite similar for whites, blacks, and Native Americans in some years but have sharply diverged in other years. (The greater variability of Native American rates results in part

³² Once again, it is essential to compare departure rates on a percent-of-eligibles basis. When downward dispositional departure rates are computed as a percentage of all cases, these rates show a reverse pattern—males and blacks have higher downward departure rates—but this is simply because many more of these offenders have presumptive prison sentences.

from the smaller number of these offenders.) White downward departure rates were much higher than black rates in most years through 1989; they were modestly higher from 1990 through 1993 and almost identical from 1994 to 1999. But in 2000 and 2001, white downward departure rates again substantially exceeded black rates (24 percent more in 2000, 20 percent more in 2001). In 2002, the white rate was 10 percent higher.

Downward dispositional departure rates also tend to be much higher for certain offenses. Child sex abuse cases, particularly those involving family members (intrafamilial sex abuse), had very high downward departure rates throughout the 1980s (Frase 1993a, pp. 309–12). But this pattern disappeared in later years, coinciding with the passage of enhanced penalties for sex offenders beginning in 1989. Drug crimes have higher-than-average downward departure rates in most years. Second-degree assault has had very high downward departure rates in all years (over 50 percent in 2000 and 2001). This offense involves use of a dangerous weapon, but there is no requirement of intent to cause serious bodily harm. It is ranked at severity level VI, for which prison commitment is normally presumptive only for offenders with more than two criminal history points; however, it carries a presumptive prison term regardless of criminal history because of a mandatory minimum statute (which, however, still permits downward departure on the prosecutor's or the court's motion). Many qualifying "dangerous weapons" are knives and clubs, not working firearms. Also, many second-degree assaults occur in bars or between neighbors or acquaintances. The diverse and often mitigated offense characteristics of this offense account for both its modest severity ranking and the high departure rates observed.

Dispositional departure rates, both downward and upward, are also particularly high in certain areas of the guidelines grid. For offenders with zero criminal history points convicted of offenses placing them on one of the two severity levels just above the disposition line (severity levels *VII and *VIII, as of 2001), downward dispositional departure rates often approach 50 percent and have been as high as 60 percent (in 2001, departure rates in these two cells were 53 and 48 percent, respectively). Upward dispositional departure rates tend to be highest for offenders with a high criminal history score. Both of these patterns reflect preguidelines sentencing norms (MSGC 1984, p. 22), which the commission sought to change with only partial success (see discussion of the commission's prescriptive policy choices in Sec. III.A, above).

The pattern of departure rates across the grid is illustrated in tables 2 and 3, which both report 2001 prison rates for each guidelines cell. Most cells below the disposition line contain cases (in some cells, more than half of the cases) with presumptive prison sentences. In order to distinguish clearly between upward and downward dispositional departures and to show how these departures vary by severity and criminal history, presumptive prison and presumptive stay cases are analyzed separately. For presumptive prison cases (table 2), cells in the lower left corner of the grid tend to have high downward departure rates (for these cases, the departure rate equals 100 minus the prison rate). For presumptive stay cases, grid cells that border the disposition line tend to have higher upward departure rates (table 3; for these cases, the prison rate equals the departure rate). In some parts of the grid, departure rates are very low. For offenders with zero criminal history in cells below the disposition line, an executed prison term is very rarely imposed in presumptive stay cases; conversely, in cells at the two highest severity levels (table 2), the prison rate is 100 percent in most years. The overall pattern of prison use across the grid thus resembles the four-zone schema proposed by Morris and Tonry (1990, pp. 60, 77): there are two outer zones with strong presumptive prison and no-prison rules (the "in" and "out" zones) and two inner zones with weaker presumptions (the "in but" and "out but" zones).

(2) *Multivariate analysis of dispositional departure rates.* The strong racial differences in dispositional departure rates, noted above, call for further examination. Downward departures deserve particularly close scrutiny for several reasons: such departures are frequent, the racial disparities in these departure rates are often quite large, and the most frequent reason cited for these departures (other than "plea agreement") is that the offender is "amenable" to probation and/or to treatment—a rationale with a significant potential for race and class bias (Frase 1993a, p. 326; MSGC 2003b, sec. II.D.101). In contrast, upward dispositional departure rates are low, racial differences are smaller and less consistent, and almost all of these departures (91 percent in 2001) occur because the defendant requested an executed prison term (usually so that it could be served concurrently with another prison sentence) or because the defendant agreed to the departure as part of a plea bargain (MSGC 2003d, p. 23). As noted earlier, in many of the latter cases, the sentence is not, in real-offense terms, actually an upward departure.

In an earlier study (Frase 1993a, pp. 308–12, 327–28), I used logistic regression to examine the impact of race and other factors on downward

TABLE 2
Minnesota Sentencing Guidelines, Prison Rate by Grid Cell, 2001,
Cases with Recommended Prison Sentences Only

Severity Level	Criminal History Score							Total
	0	1	2	3	4	5	6+	
X:								
Percent prison	100	100	100	100	100	100	100	
Total no. in grid cell	18	5	3	0	2	3	2	33
IX:								
Percent prison	100	100	100	100	100	100	100	100
Total no. in grid cell	18	10	7	2	4	1	6	48
VIII:								
Percent prison	52.4	65.7	74.2	89.2	85.7	83.3	100	64.6
Total no. in grid cell	252	70	66	37	28	12	18	483
VII:								
Percent prison	47.1	61.7	79.1	77.6	91.9	90	88.4	63.1
Total no. in grid cell	276	120	67	58	37	20	43	621
VI:								
Percent prison	27.6	55.6	65.7	70.9	78.6	82.0	82.1	59.8
Total no. in grid cell	181	108	99	127	70	50	84	719
V:								
Percent prison	33.3	—	100	62.8	78.9	68	84	74.1
Total no. in grid cell	3	0	3	43	38	25	50	162
IV:								
Percent prison	8.3	66.7	71.4	66.7	57	63.3	78.2	65.9
Total no. in grid cell	12	3	7	9	114	60	147	352
III:								
Percent prison	40	0	42.9	20	54.9	63.5	82.8	68.4
Total no. in grid cell	5	1	7	5	91	63	151	323
II:								
Percent prison	75	25	100	33.3	100	50	72	71.3
Total no. in grid cell	4	4	2	3	3	2	261	279
I:								
Percent prison	0	16.7	71.4	28.6	50	0	69.8	59.7
Total no. in grid cell	1	6	7	7	2	1	53	77
Total:								
Percent prison	46.1	60.9	72.8	71.1	68.9	71.3	78.5	65.5
Total no. in grid cell	770	327	268	291	389	237	815	3,097

SOURCE.—MSGC monitoring data; see n. 19.

NOTE.—This table includes only cases subject to presumptive prison terms. Most of the cases in cells below the disposition line carry presumptive stayed sentences and are excluded. For a summary of the major categories of below-the-line cases with presumptive prison terms, see the notes to table 1.

TABLE 3
Minnesota Sentencing Guidelines, Prison Rate by Grid Cell, 2001,
Cases with Recommended Stayed Sentences Only

Severity Level	Criminal History Score							Total
	0	1	2	3	4	5	6+	
VI:								
Percent prison	4.3	5.7	11.8					5.5
Total no. in grid cell	352	106	68					526
V:								
Percent prison	2.5	3.6	1.3					2.5
Total no. in grid cell	285	110	78					473
IV:								
Percent prison	.8	5.2	7.4	17.6				4.8
Total no. in grid cell	744	310	242	176				1,472
III:								
Percent prison	.3	6.4	8.2	22.3				5.2
Total no. in grid cell	694	235	184	148				1,261
II:								
Percent prison	.9	4.8	9.1	15.9	14.5	20.7		6
Total no. in grid cell	1,495	622	425	315	207	145		3,209
I:								
Percent prison	.5	.9	11.9	19.5	20	29		6.2
Total no. in grid cell	400	116	84	82	45	31		758
Total:								
Percent prison	1.2	4.8	8.4	18	15.5	22.2		5.4
Total no. in grid cell	3,970	1,499	1,081	721	252	176		7,699

SOURCE.—MSGC monitoring data; see n. 19.

NOTE.—Severity levels VII–XI are excluded from this table because the cells in those severity levels contain no cases with recommended stayed sentences.

dispositional departure decisions in 1987 and 1989—two years in which white-black disparity was particularly great. That study found that race was not a statistically significant (or even near-significant) predictor of downward departure, after controlling for legal and extralegal factors such as offense severity and type, criminal history, gender, plea, and judicial district. Nor was race a significant predictor of the decision to cite amenability to probation or treatment as a reason for a downward departure.

These regression analyses were repeated with data from 2000 and 2001 (two years in which substantial white-black disparity in overall rates of downward dispositional departure reappeared after an absence of over a decade). Again, race was not a significant predictor in either year. This was a very robust finding, which did not vary when the

model was respecified in various ways to overcome potential statistical biases.³³

b) *Durational Departures.* As is shown in figure 2, rates of durational departure on executed prison sentences have increased considerably over time. Downward departure rates almost doubled between 1981 and 2002; upward departure rates increased by 50 percent through 2000, then declined through 2002.³⁴ As was true of dispositional departures, downward durational departure rates have always greatly exceeded upward departure rates (often by a factor of more than two to one). Durational departures greatly increased after 1989. Increased downward departure rates are not surprising in light of the increased presumptive durations enacted in 1989, but upward departure rates increased just as much. Again, however, some of the upward departures may actually reflect downward departures—real-offense sentencing mitigation can be achieved by charge reduction combined with an upward durational departure, which recaptures some of the charging leniency.

In terms of degree of departure, most executed-prison durational departures are fairly modest. In 2001, 47 percent of offenders with downward departures received three-quarters or more of their presumptive duration, and only 8 percent received less than half of the presumptive sentence (MSGC 2003*d*). Among offenders receiving an upward departure, 79 percent received less than double the presumptive term,

³³ These models, like those in the earlier study, were limited to offenders with presumptive prison-commit sentences—those who are eligible for a downward dispositional departure. Among these offenders, the distributions of offense severity and criminal history scores are skewed to the high end, but when natural log values of these scores were used, race (black offender, yes/no) was still not even close to significant. Another problem with these data is that they contain both case-level and contextual (judicial district) variables, for which more complex, hierarchical modeling techniques are preferred (Weidner, Frase, and Pardoe 2004). But with or without the judicial district variables, race was not a significant predictor. These models predict over 70 percent of the disposition decisions, and about one-third of the incorrect predictions have an apparent explanation: the court found the offender “amenable” to treatment or probation and thus granted a departure despite the presence of factors that would otherwise result in imposition of the presumptive executed prison term. In separate models predicting whether the court will grant a downward dispositional departure citing “amenability to probation,” race was not a significant factor.

³⁴ Nonexecuted-prison durational departure rates also increased, but with an opposite pattern: upward departure rates increased much more than downward departure rates. The relatively higher rate of upward departures for nonexecuted sentences probably results at least in part from plea bargains in which defendants trade a formal or de facto (reduced-charge) downward dispositional departure for an upward durational departure on a stayed prison sentence, which they hope will never be executed (see discussion of *State v. Givens*, 544 N.W.2d 774 [Minn. 1996]).

10 percent received double, and 11 percent received more than double. Sex offenders were particularly likely to receive lengthy enhanced terms (in 2001, 15 percent received double the presumptive term, and 24 percent got more than double).

Durational departures also vary considerably by region of the state, gender, and race. In 2000 and 2001, one judicial district had a total executed-prison durational departure rate over twice as high as the district with the lowest rate (MSGC 2003*d*, p. 29). When the direction of departure is examined separately, the interdistrict variation is even greater (in 2001, it ranged from 5 to 17 percent for upward departures, and from 14 to 41 percent for downward departures). Males tend to be treated more harshly, but gender differences are not as consistent as they are for dispositional departures: male upward executed prison durational departure rates are higher in some years but not in others; rates of downward departure for males are higher in some years and lower in others.

As for variations by race, executed-prison downward durational departure rates are higher for blacks than for whites in almost all years. As for upward durational departures, blacks have higher rates in some years, but equal or lower rates in others. Departure rates for Native Americans are even more varied by year (because of the smaller numbers of these defendants) but tend to be fairly similar to white departure rates. In terms of offense, overall rates of executed prison durational departure are highest (ranging from 40 to 50 percent) for homicide (murder and manslaughter), sex offenses, and drug crimes (MSGC 2003*d*). The overwhelming majority of drug-crime durational departures are downward.

3. *Use of Sentencing Alternatives (Prison, Jail, and Other).* As is shown in figure 5, the proportion of offenders receiving an executed prison sentence has remained fairly constant over time, but the proportion receiving jail terms increased steadily through 1991. The prison rate has varied between 18.6 and 23.6 percent except in 1981, when only 15 percent of felons were sent to prison. The unusually low rate in 1981, the first full year after the guidelines became effective, may reflect the differential effects of resistance by practitioners to the commission's goal of sending more person offenders and fewer property offenders to prison. Practitioners could immediately resist presumptive prison terms for low-criminal-history person offenders by means of formal and de facto (reduced-charge) downward dispositional departures. But avoidance of presumptive stayed terms for medium-history property

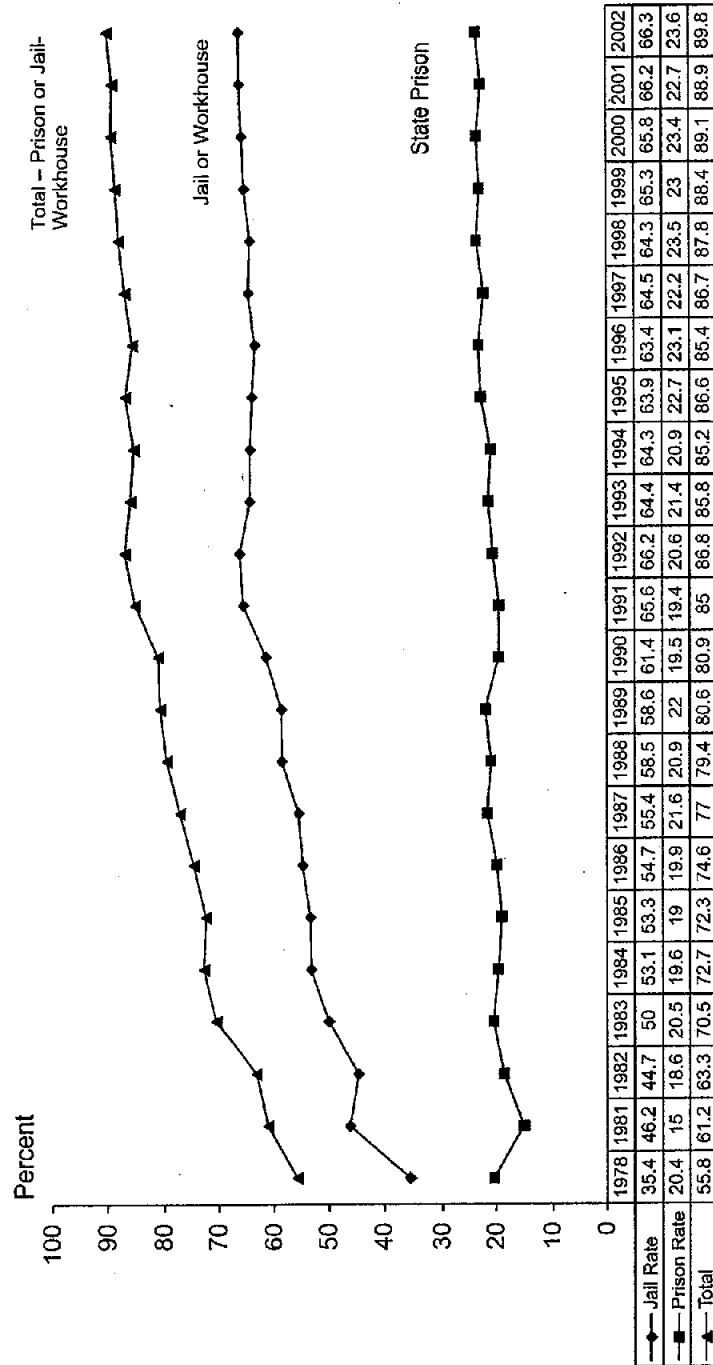


Fig. 5.—Minnesota prison and jail sentence rates, 1978, 1981–2002. Source: MSGC monitoring data.

offenders took longer. In these cases, prosecutors have limited ability to increase conviction charge severity, and upward departures are more difficult to obtain than downward departures because most of the former are not agreed to by defendants and are more likely to be appealed. To increase sanction severity for property offenders, prosecutors had to build up these offenders' criminal history scores by filing more counts or requiring pleas to more counts.

The likelihood of receiving a prison sentence continues to vary considerably by region of the state, gender, and race. These variations reflect differences, across regions and demographic groups, in the proportion of cases for which the guidelines recommend a prison sentence as well as variations in departure rates. Among the ten judicial districts, 2001 prison sentence rates varied from a low of 17 percent to a high of 27 percent, and the range has been much greater in some years (MSGC 2003*d*, p. 14). Prison rates are two-to-three times higher for males than for females and are also consistently higher for blacks and Native Americans than for whites. In 2001, the black, Native American, and white rates were 29, 25, and 19 percent, respectively (MSGC 2003*d*, p. 13). Despite substantial rates of dispositional departure, the use of prison sentences tends to be proportional to offense severity and criminal history score (see tables 2 and 3 above).³⁵

As was noted earlier, one of the commission's prescriptive sentencing policy goals was to reduce the use of state prison sentences for property offenders. This goal was achieved in the first two years; the prison rate for property offenders fell from 16 percent in 1978 to 9 percent in 1981 and was 12 percent in 1982. But by 1983 the rate was back up to 16 percent, as prosecutors filed and retained more charges in order to increase these offenders' criminal history scores. By 1989, the prison rate for property offenders had risen to 19 percent. To counteract this trend, the commission adopted a criminal history weighting scheme under which many property crimes count only a half point (moreover, total scores ending in .5 are truncated, counting only the integer value).

³⁵ Prison use across the guidelines grid is more proportional than would be suggested by tables 2 and 3. In those tables, the marginal data (column and row totals) are heavily influenced by the distribution of cases in each column and each row (e.g., almost all of the severity level II cases in table 2 have a criminal history of six or more). In 2001, for the grid as a whole (including presumptive stay and presumptive prison cases), the column totals (prison percentages as criminal history increases from zero to 6+) are 8.5, 14.8, 21.2, 33.3, 47.9, 50.4, and 78.5. The row totals (prison percents as offense severity increases from I to X) are 11.1, 11.2, 18.1, 16.6, 20.8, 36.9, 63.1, 64.6, 100, and 100 (MSGC 2003*b*, 2003*d*, p. 15).

Following this change, the prison rate for property offenders fell to 16 percent in 1990, but it rose again in later years (to 17.1 percent in 2000, declining to 16.5 in 2001).

The proportion of felons receiving a jail sentence rose from 46 percent in 1981 to 66 percent in 1991 and remained at that level through 2002 (see fig. 5). To some extent, the increases under the guidelines merely continued a trend that began in the 1970s. However, increased jail sentencing also reflected excess jail capacity in the early years of the guidelines, increased pressures for more punitive sentencing, and the lack of guidelines for the use of jail sentences (Frase 1993a, p. 332).

Data on felony sentencing in other states show that Minnesota consistently imposes far fewer prison sentences, but many more jail sentences. From 1986 (the first year of the national data series) through 2000, national prison rates for felonies generally varied between 40 and 46 percent (see, e.g., Bureau of Justice Statistics 2003a, p. 2). Minnesota's prison sentence rate in most of these years was between 20 and 23 percent. National jail sentence rates in most years fell in a range of 21–26 percent; Minnesota's rates ranged between 55 and 66 percent. As a result of its high jail sentence rate, Minnesota's total custody (prison or jail) sentence rate was much higher than the national average and steadily increased over time (from 75 percent in 1986 to 89 percent in 2000); the national custody sentence rate varied between 66 and 71 percent and did not increase. However, Minnesota's preference for jail sentences means that average custody terms are much shorter, and they are served closer to the defendant's home community, thus more easily accommodating visits and release for work or treatment.

The average duration of executed prison terms imposed remained stable between 1981 and 1989, varying within a range of thirty-five to forty-one months (MSGC 2003d, pp. 20–21; preguidelines durations were similar [see MSGC 1984, p. 27]). As a result of the substantial increases in presumptive prison terms and other punitive sentencing laws enacted in 1989 and later years, the average pronounced executed prison duration from 1990 through 2001 was much higher, varying in a range of forty-five to fifty-one months. Jail sentence durations show a different pattern—falling fairly steadily during the early 1980s (from an average of about 5.5 months in 1981). Since 1986, jail durations have remained quite stable, averaging about 3.5 months in all years. Data on pronounced jail sentence durations must be interpreted cautiously,

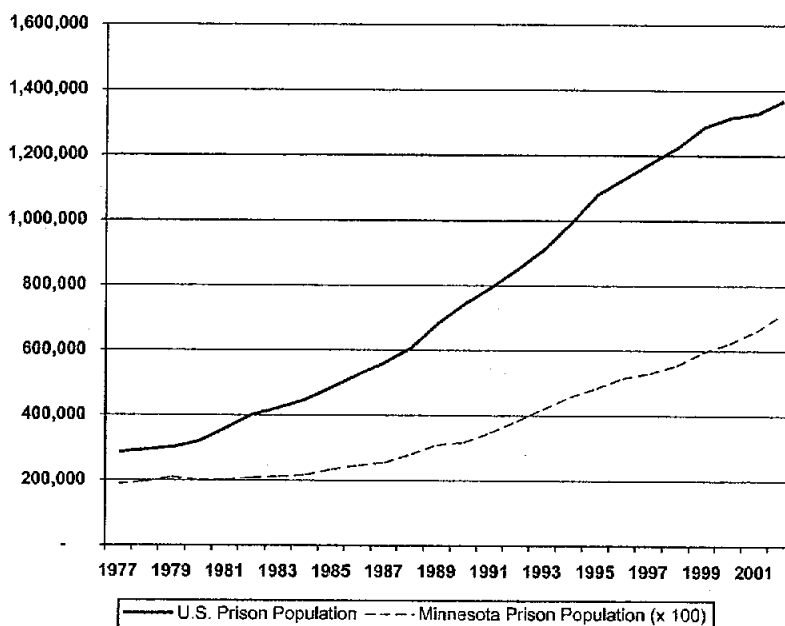


FIG. 6.—U.S. and Minnesota prison populations, 1977–2002. Sources: The source for the 1980–2002 national prison population data is Bureau of Justice Statistics (2004). National data for earlier years, as well as all Minnesota data, are taken from annual prison population reports (e.g., Bureau of Justice Statistics 2003*b*, p. 3).

however. Many offenders actually serve substantially less time because of credit for pretrial detention and releases for treatment or other reasons; conversely, some offenders spend a significant time in pretrial detention and are then released at sentencing with no formal jail “sentence” (MSGC 2003*d*, p. 20).

4. *Resulting Prison and Jail Inmate Populations.* As shown in figures 6 and 7, Minnesota’s prison and jail populations have increased substantially since the guidelines went into effect, but at lower rates than the increases in national inmate populations. From 1980 through the early 1990s, increases in Minnesota prison and jail populations were driven primarily by increases in the number of felony convictions (Frase 1995, pp. 193–94). After 1990, felony caseloads grew at a slower pace until 2001, but the rate of increase in prison populations accelerated; this resulted primarily from the sharp increase in average sentence durations, noted above. Another factor contributing to prison population growth was an increase in rates of revocation of probation and postprison supervision for “technical” violations (i.e., without a new

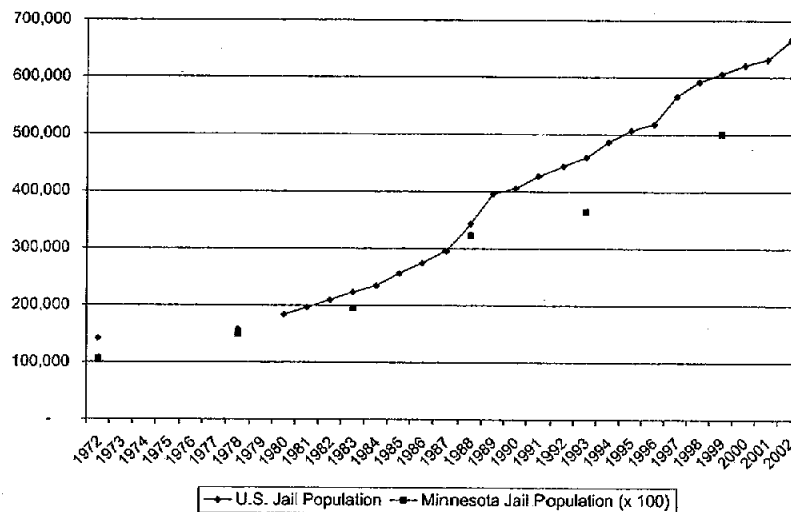


FIG. 7.—U.S. and Minnesota jail populations, 1972–2002. Sources: The source for the 1980–2002 national jail population data is Bureau of Justice Statistics (2004). National data for earlier years, as well as all Minnesota data, are taken from periodic jail censuses (e.g., Bureau of Justice Statistics 2001, p. 2).

conviction). In the 1980s, both types of revocation had accounted for lower proportions of annual prison admissions than each did before the guidelines: the 1978 probation and prison-release revocation rates (percent of total prison admissions) were 11 and 22 percent, respectively, whereas the 1989 rates were 7 and 17 percent, respectively.³⁶ But by 1995, these rates had risen to 11 and 21 percent, respectively. By 2001, technical probation revocations accounted for 17 percent of prison admissions, and technical postprison revocations accounted for another 29 percent; thus, almost half of prison admissions were for violation of release conditions. (Of course, some of these offenders did commit new crimes but were not apprehended, prosecuted, or convicted.) Similar or even higher proportions have been reported in other states. In California, parole revocations alone accounted for half of prison admissions by the late 1980s (Zimring and Hawkins 1995, p. 174). By

³⁶ Probation revocation rates are estimated based on prison admissions data from the Minnesota Department of Corrections and sentencing data from the commission (for each year, new prison commitments under the guidelines plus life sentences [which are excluded from the guidelines] are subtracted from total prison admissions for that year). Prison admissions data for 2001 are from the Minnesota Department of Corrections (2004). Data for 1981–2000 are from the Minnesota Department of Administration (2004). Data for 1978 are from the Minnesota Department of Corrections (1993).

1999, the proportion for California had risen to 67 percent; rates in other states ranged from 7 to 41 percent, averaging 21 percent (Reitz 2004, p. 214).

The legislative and commission goal of avoiding prison overcrowding was achieved throughout most of the 1980s—a period when as many as two-thirds of the states had prison populations exceeding their highest rated capacity (see, e.g., Bureau of Justice Statistics 1989, p. 5). Minnesota's achievement is all the more remarkable considering the major increases in felony caseloads that occurred in the state during this time and the fact that high-security inmates continued to be kept in single cells until the late 1990s. From 1991 through 1995 the state experienced moderate overcrowding, ranging from 102 to 111 percent of rated capacity (see, e.g., Bureau of Justice Statistics 1994, p. 6). Since 1996, Minnesota prison populations have remained slightly under capacity (96–99 percent occupancy), while about half the states continue to experience moderate to severe overcrowding (see, e.g., Bureau of Justice Statistics 2003*b*, p. 7).

Minnesota jail populations increased rapidly in the 1980s, largely because of increased felony caseloads and the rising proportion of felony convictions resulting in a jail sentence (mitigated in part by the falling average duration of these jail terms). Jail populations continued to rise in the 1990s, but at a slower rate, reflecting slower rates of increases in case volume (partly offset by increasing revocation rates), constant or decreasing proportions of offenders receiving a jail sentence, and no change in the average duration of jail terms.

Despite Minnesota's frequent and increasing use of jail sentences and its substantially increased jail populations, the state's jail population has grown less than the national average (see fig. 7). Between 1978 and 1999 (the last year with comparable state and national jail data), Minnesota's jail population increased by 233 percent; for the nation as a whole the increase was 284 percent. Comparisons of prison populations (fig. 6) show an even greater difference, despite the accelerating rates of growth Minnesota experienced in the 1990s, which in some years exceeded the national rate. Between 1978 and 2002, Minnesota's prison population increased by 265 percent, while the United States prison population (including federal prisons) increased by 365 percent. As a result, Minnesota actually improved its ranking as a low-prison-rate state. In 1978, the state was tied with Massachusetts for the third-lowest per capita prison rate (Bureau of Justice Statistics 1980, p. 4, fig. 6). But from 1983 through 2002, Minnesota's prison rate was the lowest or second

lowest of any state (see, e.g., Bureau of Justice Statistics 2003*b*, p. 4). And despite Minnesota's heavy use of jail sentences for felony offenders, its per capita jail rate also remains far lower than the national average, and its total incarceration rate (jail plus prison populations) is the second lowest in the nation (Bureau of Justice Statistics 2002*a*, p. 13).

The conviction offenses of Minnesota prison inmates changed little from 1982 (the earliest year with offense-group data) through 1989 (in both years, about 60 percent were person offenses, 33 percent property, and 6–8 percent other offenses, including drugs; Minnesota Department of Administration 2004). But in later years the offense mix changed considerably, with person and property crimes declining while drug and other offenses increased. On January 1, 2002, person, property, drug, and other offenders represented, respectively, 56, 16, 18, and 10 percent of prison inmates (Minnesota Department of Corrections 2004). And by 2003, these proportions were 50, 16, 23, and 11 percent, respectively (MSGC 2004*b*, p. 22).

In contrast to its low incarceration rate, Minnesota has a very high rate of probationary supervision. At the end of 2001, there were estimated to be over 3,081 adults on probation (including for misdemeanor violations) per 100,000 state residents, which was the fourth highest rate in the nation (Bureau of Justice Statistics 2002*b*, p. 3). But the state's per capita parole supervision rate was the twelfth lowest. These very different rankings are because of Minnesota's sparing use of imprisonment (hence, fewer persons on postprison release) and heavy use of stayed sentences (probation).

Perhaps the most disturbing aspect of Minnesota's prison populations under the guidelines is their racial composition. A series of reports comparing per capita incarceration rates by race (white and black state prison inmates per 100,000 state residents of each race) has revealed striking racial disproportionality. Using 1982 data, Alfred Blumstein (1988) found that black males were 21.74 times more likely than white males to be imprisoned in Minnesota—the worst ratio of the thirty-four jurisdictions studied. Michael Tonry (1991) computed race-specific 1988 per capita incarceration rates (including females) for forty-nine states and the District of Columbia and again found that Minnesota's black-white ratio (19.01:1) was the highest in the nation. By 1994, Minnesota's ratio had climbed even higher, to 22.77:1 (Mauer 1997, p. 4), and was still the highest in the nation.

Several factors seem to explain these disparate incarceration rates. It should be pointed out, first, that Minnesota does not have a particularly

high black incarceration rate—in 1988 and 1994, thirty-two of the fifty jurisdictions studied had higher rates. Minnesota's high black-white ratio results from its extremely low white per capita incarceration rate—the lowest in the nation during each of the three years studied in the analyses cited above. Second, Minnesota's extremely low white incarceration rate, and substantially higher black rate, have much to do with the number and kinds of crimes for which these offenders are convicted (Mauer 1997, p. 7). Black offenders more often have higher-severity conviction offenses or more extensive criminal history scores for which the guidelines recommend an executed prison term. In 2001, 36 percent of convicted black offenders had a recommended prison term, but only 25 percent of whites did. Since local jail sentences are imposed on most Minnesota offenders who do not receive an executed prison term, there is less racial disparity in Minnesota jail populations. The most recent national data are for 1999; with jail inmates included in the incarceration rate, Minnesota's black-white ratio was 12.6:1, and three other jurisdictions (Connecticut, New Jersey, and Washington, D.C.) had higher ratios (Bureau of Justice Statistics 2002a, p. 13).

Another way of looking at the disparate prison population data is to compare it with race data on earlier stages of case processing. As was noted previously, there is little evidence of systematic racial bias in the sentencing decisions controlled primarily by judges (to depart with respect to disposition or duration). But perhaps bias occurs in the decisions leading up to conviction. Blacks accounted for almost 30 percent of felony convictions in 2001, but they represented only about 4 percent of the state population (U.S. Census Bureau 2004) and an even lower percent of the adult population. Is all of this disparity because of offense behavior? Or is some of it because of discrimination by police or prosecutors? One study analyzing "real-offense" data found evidence that charges carrying a presumptive prison term were much more likely to be filed and retained to conviction for black offenders, particularly when these offenders were unemployed—which they often were (Dailey 1993b, pp. 769–71). However, this effect was found primarily in one large urban county.

It appears that most of the racial disparity in Minnesota conviction rates (and thus also in prison populations) begins at the point of arrest: in 2001, blacks represented 38 percent of adult violent Index-Crime arrests and 30 percent of drug arrests (Minnesota Bureau of Criminal Apprehension 2004). A theory emphasizing racial disparities in arrest

rates is consistent with previous findings, using national data, that about three-quarters of prison population disparities can be explained by racial differences in arrest rates (Tonry 1995, pp. 49, 63–80).³⁷ However, a comparison of Minnesota and national data suggests that arrest rates are even more racially disproportionate in Minnesota than they are in other states. For violent Index Crimes, Minnesota's black adult arrest rate per 100,000 black citizens in 2001 was between sixteen and nineteen times the white per capita arrest rate, whereas for the nation as a whole the black-white ratio was about four to one.³⁸

An important question, but one that is beyond the scope of this essay, is why arrest rates are so much more racially disparate in Minnesota than for the nation as a whole. One explanation might be that Minnesota's black population is more crime prone than the national average because so many blacks are recent arrivals to the state and are therefore less socially integrated—Minnesota's black population more than tripled from 1980 to 2000 (Minnesota State Planning Agency 1991, p. 3; U.S. Census Bureau 2004).³⁹ A related explanation could be that Minnesota's black population is concentrated in high-crime, inner-city neighborhoods, whereas in other states, particularly in the South, many blacks live in rural areas with low crime rates. A third possibility is that, in other states, black arrest rates are artificially suppressed by police or prosecution decisions not to enforce the criminal law fully in black neighborhoods. In other words, perhaps Minnesota is less biased against black victims than some other states (Tonry 1995, p. 68). All three of these theories (greater transiency, fewer blacks in low-crime rural areas, and less bias against black victims) would help to explain a curious fact about racial disparities

³⁷ Based on victim-survey data on the perceived race of offenders and on self-report studies, researchers have further concluded that, except for drug offenses, arrest rates are largely consistent with offending rates (Tonry 1995, pp. 72–79).

³⁸ Minnesota adult arrest data are from Minnesota Bureau of Criminal Apprehension (2004). National arrest data are from Federal Bureau of Investigation (2002: total estimated U.S. arrests [p. 233], arrests by age and race [p. 254]). Minnesota and national adult population data by race are from U.S. Census Bureau (2004). The range of estimated Minnesota black-white arrest ratios cited in the text results from using census data only for persons listing one race (ratio = 18.8:1), or using data for all persons who cited each race alone or in combination with other races (ratio = 16.2:1). The national ratios for each method are 3.7:1 and 3.6:1.

³⁹ In 1980, 53,344 Minnesotans identified themselves as black. In the 2000 Census, 171,731 respondents said they were black, and 202,972 said black or black plus one or more other races.

in state prison populations: the states with the worst black-white ratios tend to be eastern and upper Midwest states with liberal political traditions—in 1994, the five worst ratios were found in Minnesota, Iowa, Pennsylvania, Connecticut, and Wisconsin, while many southern states (Tennessee, Georgia, South Carolina, Mississippi, and Alabama) had black-white prison ratios much lower than the national average (Mauer 1997, p. 4).

5. *Other Changes in Sentencing and Case Processing.* There is much less data on charging and plea bargaining practices for the years since 1984. Trial and guilty-plea rates have remained about the same since 1978, and there is no reason to believe that plea bargaining disparities have disappeared. The practice of charging and retaining additional counts to increase current and future criminal history scores continued in the late 1980s and into the 1990s.

VI. Twenty-Five Years of Sentencing Reform in Minnesota
Was it all worth it? Did Minnesota's guidelines achieve the goals underlying this reform, and did their implementation have any serious unintended consequences? What are the continuing challenges, unresolved issues, and future prospects for guidelines sentencing in Minnesota?

A. Achievement of Reform Goals, Old and New

Although the primary original goal of the Minnesota guidelines was to reduce sentencing disparity, several other reform goals and criteria have been recognized over the years (Frase 1993*b*, pp. 364–66; 1999, pp. 73–75). The most important are listed below, along with my assessment of Minnesota's degree of success in achieving each goal or criterion.

1. *Uniformity.* The guidelines seek to achieve greater uniformity in the use of state prison sentences, with particular emphasis on preventing racial, gender, and socioeconomic disparities (MSGC 2003*b*, sec. I; Minn. Stat., sec. 244.09, subd. 5). Most evaluations have concluded that sentencing and correctional decisions became more uniform under the guidelines, at least relative to conviction offense and prior record. However, female offenders still receive more lenient sentences, and minorities are disproportionately represented in the state's prisons. There is also some evidence that minority offenders receive less favorable treatment in charging and plea bargaining decisions, at least in certain judicial districts.

2. *Proportionality.* Disparity reduction also requires increased proportionality of prison commitment rates and durations, relative to the commission's offense severity rankings, criminal history scoring, and other prescriptive choices (MSGC 2003*d*, p. 1; Minn. Stat., sec. 244.09, subd. 5). In general, the guidelines have succeeded—sentencing has become more proportional. However, the documented shifts in charging practices, as well as the commission's limited “real-offense” data, suggest that proportionality did not increase nearly as much relative to offenders' actual criminal behavior. Even relative to conviction offense and prior record, several of the commission's prescriptive choices were strongly resisted in practice. Judges have been reluctant to imprison low-criminal-history person offenders (e.g., those at severity levels *VII and *VIII; see table 2) and have also given substantial weight to criminal history in making departure decisions (Frase 1993*a*); prosecutors have built up offenders' criminal history scores to send more property offenders to prison; the state supreme court recognized offender “amenability” to prison and probation as a grounds for dispositional departure, notwithstanding the commission's stated emphasis on just deserts; and the legislature continued to view public safety as a very important goal of sentencing and repeatedly endorsed offender-based assessments of offender dangerousness and amenability to treatment. Although proportionality relative to desert is still important, the guidelines have evolved into a system of limiting retributivism, in which crime control and other nondesert goals and values operate within outer limits set by desert (Morris 1974; Frase 1997). However, a closer look at the commission's work—what it did, not just what it said it was doing—shows that the guidelines were always a very “modified” version of just deserts, and this was probably also the legislature's intent (see Secs. II and III.A, above).

3. *Rationality.* A major goal of a guidelines system designed and monitored by an independent sentencing commission is to ensure that sentencing policy formulation and modification is data driven, comprehensive across crimes and judicial districts, and insulated from short-term political pressures (Frase 1991*b*, pp. 729–30; Tonry 1996, pp. 9–10, 60–61; Minn. Stat., sec. 244.09, subd. 5). The commission's mandate, comprehensive database, and the guidelines structure facilitate the formulation of coherent, statewide policy and the avoidance of piecemeal or “crime-of-the-week” legislation. When combined with resource matching, comprehensive data-driven policy formulation permits the state to set priorities and achievable goals in the use of limited

resources. Since 1989, the legislature has often disregarded the commission's independence and expertise, issuing specific directives for guidelines changes without requesting or waiting for the commission's recommendations. Nevertheless, on most issues, the commission retains primary control over sentencing policy formulation.

Data are an essential component of rational policy making. The Minnesota commission has gathered and made effective use of a huge inventory of sentencing and corrections information, one of the most comprehensive and detailed databases ever assembled by any state. But data are sparse or lacking on some important issues, limiting the commission's ability to monitor sentencing practices and formulate policy in these areas. In particular, "real-offense" data (to assess the impact and evolution of charging and plea bargaining practices) have only been collected sporadically. Similarly, the commission's database contains very limited information about conditions of nonprison sentences and no data on important issues such as the actual jail time served and whether all or most of that time reflected credit for pretrial detention. Without such data, comparable with the detailed information on prison sentences before and under the guidelines, the commission could not fully assess the need for probation-condition guidelines and the form such guidelines should take. A third important topic on which the commission has collected very little information relates to patterns and changes over time in the state's crime rates. Lacking such information, the commission has not been able to assess the impact of guidelines rules on public safety.

Allowing prosecution and defense sentence appeals also promotes more rational sentencing policy (as well as greater uniformity and proportionality) by allowing appellate courts to enforce guidelines rules, clarify ambiguities, and gradually develop sentencing policy through a common-law process. Minnesota's guidelines case law is quite well developed and has served the above purposes well, without unduly intruding on trial court discretion (Reitz 1997, pp. 1480-88, 1500).

4. *Resource Matching.* Using the commission's expertise and independence, the guidelines seek to coordinate sentencing policy with available correctional resources, especially prison and jail capacities, with a specific goal of avoiding prison overcrowding (MSGC 1980, pp. 2-3, 13-14; 1984, p. 16; 2003*d*, p. 1; Minn. Stat., sec. 244.09, subd. 5). Minnesota was the first U.S. jurisdiction to identify and pursue this goal, which has now been widely adopted; almost every state guidelines system, which was implemented or revised since the mid-1980s, has

included resource-impact assessments, and this has become a major reason for states to adopt guidelines and sentencing commissions (Frase 1999, pp. 70–73). Minnesota's prison-impact projections have often been used to avoid or scale back expensive guidelines changes and legislative proposals (see, e.g., Dailey 1993*a*, p. 145 [sex and other violent offenders]; MSGC 2003*c*, p. 5 [felony drunk driving]). Minnesota thus largely avoided the problems of prison overcrowding and court intervention that most other states have experienced.

5. *Truth in Sentencing.* By abolishing parole release discretion and limiting judicial and prison disciplinary discretion, the legislature sought to achieve "truth and certainty in sentencing" (Knapp 1993, p. 685; MSGC 2003*d*, p. 1)—offenders must serve all of the minimum prison term pronounced at sentencing, which is two-thirds of their maximum term. A few offenders assigned to the state's challenge incarceration (boot camp) program or intensive community supervision serve less than this minimum prison term. Conversely, some offenders eligible for extended periods of supervised release may end up serving more than their maximum if the release is revoked. But, overall, truth in sentencing has been achieved and maintained.

6. *Public Safety.* Amendments to the guidelines-enabling statute in 1989 and 1996 stated that the commission's "primary" consideration should be public safety and that the commission should also consider "the long-term negative impact of the crime on the community" (Minn. Stat., sec. 244.09, subd. 5). Actually, crime control goals had never been abandoned by the legislature, or even by the commission; the initial guidelines gave very substantial weight to the offender's criminal history and allowed frequent offender risk assessments to be made—in setting conditions of probation and postprison release, when deciding whether to revoke probation or release, and in charging and plea bargaining. The offender amenability factors recognized in case law and statutes also reflected concerns for crime control rather than uniformity or desert.

It is difficult to say whether the guidelines have enhanced public safety more than the preguidelines sentencing regime would have. As in the rest of the country, reported crime rates increased in the late 1980s and early 1990s and have generally been stable or falling since then. The commission has not collected data on the achievement of public safety goals. In part, this was a deliberate decision related to the commission's decision to emphasize just deserts values. The commission's limited budget may have been another reason—crime rates

depend on many social and economic factors in addition to sentencing policy, and any thorough evaluation would be very expensive.

7. *Parsimony.* Sentencing parsimony requires that sentences be the least restrictive necessary to achieve the purposes of the sentence (Morris 1974, pp. 59–64). The commission specifically adopted this goal with respect to the use of state and local custodial sanctions and the setting of conditions of stayed sentences (MSGC 2003*b*, secs. I[4] and III.A.2). Although the use of jail sentences has greatly increased under the guidelines and the state's prison and jail populations have each more than tripled, Minnesota's use of custodial sanctions remains extremely parsimonious when compared with other states. No other state with a major metropolitan area has such low per capita prison and jail rates. The closest comparable state, Massachusetts, had a 1999 combined prison and jail rate 60 percent higher than Minnesota's (Bureau of Justice Statistics 2002*a*, p. 13).

8. *Simplicity.* The commission has sought to keep guidelines rules easy to understand and apply (MSGC 1980, p. 7; Parent 1988, p. 53, n. 3, p. 58, n. 8, p. 71). Simple rules cause fewer errors in application, and thus less disparity; they are less costly for courts and attorneys to apply; and they are easier for the public and would-be offenders to understand. There is no doubt that the Minnesota guidelines today are more complex than they were in 1980. But they remain fairly simple to apply, and, at eighty-eight pages in length, they are absolutely spartan in comparison to the federal guidelines (which currently consume about 500 pages).

B. Unintended Consequences

Even if the Minnesota guidelines achieved most of their goals, they could not be counted a success if they produced serious adverse, unintended consequences. One of the most common criticisms of sentencing guidelines is that, by limiting judicial and parole discretion, they increase the power of prosecutors to dictate the sentence (by determining the number and seriousness of the charges, and hence the presumptive sentence). There is much truth to this charge in guidelines systems with narrow ranges, limited departure power, and limited appellate review (and it is absolutely true whenever a mandatory minimum sentence applies). But prosecutorial control is less of a problem in flexible guidelines systems like Minnesota's. Minnesota judges retain very substantial discretion, and complaints about prosecutorial overcharging and dominance have been infrequent.

A more serious complaint is that the guidelines have increased racial disproportionality in Minnesota's prisons. This is ironic considering that racial neutrality was a major goal. Earlier I suggested that most of the disproportion in Minnesota's white and black imprisonment rates can probably be explained by differences in arrest rates and in legally relevant factors such as offense severity and prior record. And since most crime is local and intraracial, severe sanctions against nonwhite offenders may serve to reduce victimization against nonwhites. Nevertheless, it remains possible that charging and prior record levels reflect racial bias, particularly in the case of drug crimes. And there is increasing evidence in other jurisdictions that removing large numbers of offenders from stressed neighborhoods and families only compounds their social problems (Clear 2002; Fagan 2004).

Other complaints about Minnesota's prisons are that they hold too many minor drug offenders and too many other nonviolent persons whose probation or postprison release was revoked for technical violations rather than serious new crimes. The legislature and the commission appear to now agree that prisons have been overused for drug offenders (see below), and the commission has identified high revocation rates as part of the drug imprisonment problem. But these problems will not be solved without additional resources for adequate supervision, community treatment, and a wider range of alternatives to revocation in response to violations of release conditions.

A related complaint might be that Minnesota judges have imposed too many jail sentences since 1980 and have not made enough use of intermediate sanctions. From the perspective of community corrections, jail is better than prison because it keeps the offender closer to his family, employment and educational opportunities, and community services. Many of the offenders sentenced to jail in Minnesota would be sent to prison in other states. But intermediate sanctions are better than jail—they are more flexible, easier to quickly set up or cut back, less costly to the public, and less costly, destructive, and dehumanizing to the offender and his family. Moreover, because jail terms are shorter than prison terms, the former are easier to translate into alternative sanctions with sufficient punitive bite to maintain public and political support. Minnesota needs to convert many of its jail sentences into intermediate sanctions. This will take more resources, but only in the short term. The missing ingredient is long-term, statewide planning—exactly what the commission can and should provide.

C. Recurring Challenges

The guidelines have experienced a wide variety of challenges since their inception, but certain common themes and unresolved policy issues stand out. At the most basic level, the challenge is to find and maintain an appropriate and workable balance on several key dimensions of sentencing policy—between desert and other purposes of punishment, between uniformity and flexibility, between sentencing severity (and resources) for different offenses, and between the various decision makers who control sentencing policy. Minnesota's guidelines system has achieved and maintained a good balance in each of these areas. All traditional purposes of punishment are recognized and play important roles (and enough flexibility remains to accommodate newer theories such as restorative justice); sentences are fairly uniform and predictable as a whole, but judges retain substantial discretion to tailor the type and severity of sanctions to the particular offense and offender and to take into account (particularly in setting conditions of stayed sentences) local community values and resources. With the exception of drug sentencing, sanction severity and resources are allocated according to reasonable priorities.

There is also a good balance in the roles of various decision makers. Kevin Reitz (1998) has developed a useful schema, separately analyzing the roles and influences of policy makers who act at systemic and case-specific levels. At the systemic level, Reitz identifies the legislature and sentencing commission, if any, as the principal actors (arguably one should also include appellate courts when they issue important interpretive case law and the parole board or other corrections authorities when their regulations or policies have major system-wide effects on how sentences are carried out). Case-level actors include the defense and prosecution, probation officers, trial courts, appellate courts (when not making new law or policy), and corrections officials. Reitz argues that each of these actors needs to retain substantial power to affect sentencing outcomes, and none should dominate the others; for example, mandatory sentences give almost all control to the legislature and the prosecutor, and indeterminate sentencing gives too small a role to the legislature and appellate courts. Reitz examines several guidelines systems and concludes that Minnesota has struck a very good balance at both the systemic and case-specific levels. The history recounted in this essay supports that conclusion.

But balance, once achieved, is not guaranteed. Repeated enactment of dangerous-offender and crime-of-the-week laws threatens

proportionality and predictability values and interferes with the commission's comprehensive planning and priority setting. Mandatory minimums and other requirements impose excessive uniformity, as well as new forms of disparity (when practitioners use charging and other means to evade the new requirements). Unconstrained charging and plea bargaining practices undercut or evade statutes and guidelines rules. Legislative micromanagement—hastily considered laws directing specific changes in the guidelines that are inconsistent with their overall structure and principles—undercuts the commission's independence and the consistency and coherence of the system as a whole.

In three particular areas, case-level discretion under the guidelines remains unregulated, potentially disrupting the balance: there are no statewide guidelines for charging and plea bargaining, no guidelines for jail and other stay conditions, and no guidelines for decisions to revoke probation or postprison conditional release.⁴⁰ The commission has recognized each of these problems but has not addressed any of them in detail. In part this resulted from the lack of legislative support; the commission had only a weak mandate to promulgate stay condition guidelines and no mandate to regulate revocations, charging, or plea bargaining. There has also been a lack of consensus on the commission and in the criminal justice community about what forms of regulation to propose and a lack of commission staff time and resources to tackle such complex and controversial issues. These problems are not unique to Minnesota; no other state has done much to regulate or even study these forms of discretion. Several guidelines states have rules encouraging, requiring, or forbidding the use of intermediate sanctions in certain cases, but these rules are not very constraining (Knapp 1993, p. 699; Frase 2004). It is also noteworthy that the two states that regulate intermediate sanctions the most, Pennsylvania and North Carolina, are among the very small group of states whose guidelines also cover

⁴⁰ The lack of guidelines for any misdemeanor crimes is arguably a fourth important area of unregulated sentencing discretion. Although most state guidelines do not cover misdemeanors (Frase 1999, p. 70), and the Minnesota commission never had any express mandate to address this issue, misdemeanor and felony sentencing issues are often intertwined. Typical misdemeanor sentences (jail, home detention, probation, fines, community service, or restitution) overlap substantially with the typical conditions of probation in felony cases. Thus, misdemeanor and felony sentences are competing for the same limited correctional resources. Moreover, failure to regulate sentences in misdemeanor cases can mean that some of these offenders receive more severe sentences than many felons. And, of course, felony offenders have often received prior misdemeanor sentences and vice versa.

misdemeanor offenses (Frase 1999, p. 74). Misdemeanor sentences overlap substantially with felony intermediate sanctions; regulating the latter but not the former would produce serious proportionality problems.

The absence of any regulation of charging decisions is particularly troublesome in a conviction-offense guidelines system, where the charge at conviction (and the number and type of prior convictions) determines the presumptive sentence. The commission early on recognized the need to gather data on charging and plea bargaining practices, but such data have not been collected since the 1980s. Still, the commission's analysis and publication of data for the early years (MSGC 1984) may have sent a useful message to practitioners—that charging discretion would be scrutinized and, if found excessive, regulated in some way. Future guidelines reformers would be well advised to collect charging, plea bargaining, and real-offense data, at least in the early postimplementation phase. But it would be even better to make this a permanent part of the ongoing data-gathering system (for representative samples of cases, to keep costs down).

Another recurring challenge for all system actors, but especially the commission, has been to maintain rational and principled sentencing in the face of occasional public, political, and media panics. Readers will have noted that sentencing policy formulation in Minnesota has been strongly affected by a few high-profile cases—in particular, the rape murders that occurred in the summers of 1988 and 1991. As this essay was being written, it appeared that the cycle was about to repeat itself.

D. Looking to the Future

At the start of 2004, two major sentencing initiatives were under way. There is a good chance that one or both will result in new legislation or major revisions in the guidelines, in 2005 if not in 2004 (the legislature usually focuses on bonding bills in even-numbered years).

1. *Drug Crimes.* In 1999, a subcommittee of the commission began to reexamine sentencing policy for drug offenders (MSGC 2000, pp. 8–11; 2001, p. 13; 2003c, p. 2). This project then obtained legislative backing: a statute directed the commission to make a comprehensive study of drug policy issues, including the history of Minnesota drug laws, current practices and costs, projected cost savings to the state of diverting nonviolent drug offenders from prison to drug courts and other alternatives, proportionality issues relative to other crimes in

Minnesota and to drug sentencing in other states, and recidivism by diverted offenders (2003 Minn. Laws, 1st sp. sess., art. 1, sec. 14). These issues had taken on some urgency because of the dramatic increase in the number of drug offenders sentenced to and held in state prisons.

The commission's final report, published in January 2004 (MSGC 2004b), addressed all of these issues except recidivism (because of lack of time and resources). It concluded that the rapid increase in the number and proportion of drug offenders in the state's prisons resulted from a combination of factors: repeated increases in the severity of drug penalties (now much more severe than in most neighboring states and other guidelines states), high rates of probation revocation (due in part to inadequate resources for supervision and treatment), and recent dramatic increases in the number of methamphetamine cases. The commission also noted that the high departure rate for drug offenses undercuts the goals of the guidelines and suggests widespread agreement among practitioners that current statutes and guidelines do not adequately distinguish between more serious and less serious offenders. The report concluded with a list of options for the legislature's consideration: continuing with existing policies, revising drug threshold amounts and/or severity rankings in order to reduce imprisonment rates and durations, developing and funding an adequate infrastructure of community-based punishments and treatment programs, and developing a comprehensive statewide sentencing policy for drug offenders.

Legislative hearings were promptly scheduled (deFiebre 2004a). Legislators seemed to be genuinely concerned about the current and projected future costs of sending so many drug offenders to prison for so long. Their concern was prompted in part by the state's recent budget crisis—in the 2003 legislative session, lawmakers had to resolve a \$4.2 billion budget deficit, further deficits were projected in future years, and both the governor and the leaders of the House had pledged not to raise taxes. Some legislators may also have concluded, based on the high revocation and recidivism rates for drug offenders, that severe state prison sanctions are not effective for this group and that the money would be better spent on improved supervision and community-based treatment.

2. *High-Risk Sex Offenders.* In November of 2003, a college student from Minnesota was abducted in a shopping mall parking lot in North Dakota, just over the state line; since she was not promptly found or returned, it was presumed that she had been killed (her body was found

in April). The principal suspect was a recently released, "high-risk" sex offender, also from Minnesota, who was seen at the mall and tied in other ways to the crime. Minnesota's governor took the occasion to announce that he would propose restoration of capital punishment, including for some sex offenses not resulting in death. Legislators from both major parties, as well as public opinion polling, expressed opposition to the death penalty but embraced other proposals for sex offenders, including more severe prison terms, increased or even lifetime supervision, extended civil commitment, life without parole, and a return to indeterminate sentencing for some or all sex offenders (legislators noted that the per diem cost of imprisonment is about one-fourth the cost of civil commitment; deFiebre 2003, 2004c, 2004d, 2004e, 2004f; Lopez 2004). Thus the cycle was repeated—a shocking, seemingly random, violent crime created a furor of activity in media and political circles, simultaneously raising, once again, fundamental questions about the problems of controlling high-risk offenders, the limits of desert, whether to use criminal or civil measures, which decision makers to trust with these decisions, and how much these measures will cost in the near and long term.

An important new issue in the latest cycle is the role of the public in lawmaking. The governor hoped to get around legislative resistance to the death penalty by putting this question on the ballot as a proposed constitutional amendment (deFiebre 2004b). In addition, legislation was introduced to authorize direct voter participation in the enactment and repeal of laws, via initiative and referendum (deFiebre 2004c). Unlike many other states, Minnesota has never used ballot measures in this way. The experience of states that have done so suggests that if this practice becomes established in Minnesota, rational policy making will suffer.

VII. Conclusion

In a field as volatile as felony sentencing, the mere survival of Minnesota's guidelines for well over two decades is a major accomplishment. In at least six states, sentencing guidelines or the sentencing commission have been abolished or dramatically curtailed (Frase 1999, pp. 74–75). Minnesota's guidelines have not only survived, they have survived largely intact and continue to achieve their goals of fair and rational sentencing. But their continued success is an open question. Whether guidelines are enacted, let alone survive and succeed, is highly contingent as to place and time. Minnesota's guidelines reform benefited

from long-standing state traditions of good government, fiscal responsibility, and concern for the less fortunate. The successful design, implementation, and evolution also owe much to the extraordinary vision, talent, and energy of the initial commission members and staff and their successors—people like Jan Smaby (the first commission chair), Douglas Amdahl (a trial judge member of the initial commission who then became chief justice of the state supreme court), and commission staff directors Dale Parent, Kay Knapp, and Debra Dailey. The guidelines also benefited from the support and good sense of several generations of legislative leaders, judges at the trial and appellate levels, prosecutors, and other practitioners. Other circumstances also seem quite fortunate in retrospect. One was timing: the guidelines were authorized and drafted in the late 1970s, a time when crime was a far less salient political and media issue, the state's politics were less polarized, and its population was more rooted and ethnically homogeneous. Another happy coincidence was that a single appellate court, led by a judge who was previously an influential member of the commission, had the opportunity to decide most of the critical early cases interpreting the guidelines.

In many respects, however, Minnesota is not that different from the rest of the country. Big-city gangs, drugs, and violence arrived in the 1980s, along with refugees from the collapsing inner cities of the upper Midwest. Political and media attention to issues of crime has been almost continuous since the late 1980s. Politically, the state has become moderate: by 2002 it had a conservative Republican governor (whose two predecessors were an independent and a moderate Republican), a Republican House, and a Senate with a thin Democratic majority. But the state still has the lowest or second lowest per capita prison rate in the country; the commission continues to have a major influence on the design and implementation of sentencing policy; and the guidelines themselves remain a model of rationality and balance, helping Minnesota to resist the continuing pressure to ratchet up sentencing severity.

Perhaps one reason the guidelines have succeeded and survived is that their reform goals have been relatively modest. Where they apply, the guidelines are legally binding, but they do not seek to regulate every aspect of sentencing, nor do they strictly limit those decisions that are regulated. And despite the commission's announced commitment to just deserts principles, the guidelines allow substantial scope for the application of crime control and other nonretributive purposes. The

commission has exercised leadership but has shared policy-making authority with the courts, practitioners, and the legislature. Sharing power has meant that the commission has not achieved all of its reform goals. But this sharing has given all actors and policy makers important roles in shaping the guidelines and a substantial stake in supporting and maintaining them.

It could be argued that, in some respects, Minnesota's reform goals were too modest. There are considerable potentials for disparity and misallocation of correctional resources resulting from the failure to regulate misdemeanor sentencing, probation conditions, revocation of probation and conditional release, charging, and plea bargaining. It is not certain, however, that the commission would have been successful if it had tried to regulate these matters. Judges, attorneys, and probation officers have strongly opposed probation condition guidelines, and experience shows that practitioners can evade legislatively backed guidelines rules with which they strongly disagree. For example, the commission's attempts to send more violent first offenders to prison have consistently been met with high rates of downward departure and charge reduction. And efforts to send fewer high-criminal-history property offenders to prison were undercut by prosecutorial decisions to file and retain more charges, thus building up these offenders' criminal history scores so that they once again became eligible for prison commitment. Similar resistance by practitioners might have doomed efforts effectively to regulate misdemeanor sentences, charging decisions, and plea bargaining. Practitioners have opposed limits on plea bargaining and would probably, if asked, have also opposed misdemeanor guidelines (for the same reasons that they opposed guidelines for felony probation conditions: misdemeanor and felony probation sentencing alternatives and purposes are similar).

But if pressure to escalate penalties for violent and repeat offenders continues, and if the state's budget remains tight, support may build in Minnesota to broaden the scope of the guidelines in order to ensure that limited state and local resources are put to the best use. Other states with guidelines have had experience in regulating misdemeanor sentences and intermediate sanctions (Frase 1999, pp. 70-72). In the past, those states learned from Minnesota; in the future, Minnesota may learn from them.

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